DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-329	
Title:	Chase Bank USA, N.A., Petitioner v. James A. McCoy, Individually and on Behalf of All Others Similarly Situated
Docketed:	September 16, 2009
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(06-56278)
Decision Date:	March 16, 2009
Rehearing Denied:	June 16, 2009
Questions Presented	

---Date---	--------Proceedings and Orders----------
Sep 14 2009	Petition for a writ of certiorari filed. (Response due October 16, 2009)
Oct 8 2009	Order extending time to file response to petition to and including November 16, 2009.
Oct 16 2009	Brief amici curiae of American Bankers Association and Consumer Bankers Association filed.
Nov 12 2009	Order further extending time to file response to petition to and including November 30, 2009.
Nov 30 2009	Brief of respondent James A. McCoy, Individually and on Behalf of All Others Similarly Situated in opposition filed.
Dec 14 2009	Letter of December 14, 2009, from counsel for petitioner, proposing a lodging, received.
Dec 15 2009	Reply of petitioner Chase Bank USA, N.A. filed. (Distributed)
Dec 16 2009	DISTRIBUTED for Conference of January 8, 2010.
Jan 11 2010	DISTRIBUTED for Conference of January 15, 2010.
Jan 19 2010	DISTRIBUTED for Conference of January 22, 2010.
Jan 25 2010	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 19 2010	Brief amicus curiae of United States filed.
Jun 1 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 1 2010	Supplemental brief of respondent James A. McCoy, Individually and on Behalf of All Others Similarly Situated filed. (Distributed).
Jun 21 2010	Petition GRANTED.
Jun 22 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 14 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 26, 2010.
Jul 14 2010	The time within which to file respondent's brief on the merits is extended to and including October 18, 2010.
Jul 22 2010	Motion to dispense with printing the joint appendix filed by petitioner Chase Bank USA, N.A.
Aug 26 2010	Brief of petitioner Chase Bank USA, N.A. filed.
Sep 1 2010	Brief amicus curiae of American Bankers Association filed.
Sep 2 2010	Brief amicus curiae of United States filed.
Sep 3 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 7 2010	SET FOR ARGUMENT ON Wednesday, December 8, 2010.
Sep 24 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Oct 6 2010	Record received from U.S.D.C. for Central District of California. (1 box)

Oct 8 2010	CIRCULATED
Oct 12 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 18 2010	Brief of respondents James A. McCoy, Individually and on Behalf of All Others Similarly Situated filed. (Distributed)
Nov 15 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 17 2010	Reply of petitioner Chase Bank USA, N.A. filed. (Distributed)
Dec 8 2010	Argued. For petitioner: Seth P. Waxman, Washington, D. C.; and Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Gregory A. Beck, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-09-329 SEP 14 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
KELLY THOMPSON COCHRAN
MICHELLE OGNIBENE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

QUESTION PRESENTED

The Federal Reserve Board's Regulation Z, which implements the Truth in Lending Act, requires creditors to provide an initial disclosure statement, before any transaction on an open-end credit plan takes place, containing "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Regulation Z also requires that when a creditor later changes any term that it was required to disclose in the initial disclosure statement, the creditor must "mail or deliver written notice" of that change in terms before the effective date of the change. 12 C.F.R. § 226.9(c).

Credit card issuing banks generally provide the requisite initial disclosures in or with the contract document that governs the credit card account. Such cardholder agreements commonly specify a standard periodic rate of interest and also that, if the cardholder defaults in a certain manner, then the creditor may increase the periodic rate on the account up to an identified default rate.

The question presented is:

When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does Regulation Z, 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties to the proceedings before the court of appeals.

Petitioner Chase Bank USA, N.A., f/k/a Chase Manhattan Bank USA, N.A., is a wholly owned indirect subsidiary of JPMorgan Chase & Co. No publicly held corporation owns 10% or more of the stock of JPMorgan Chase & Co.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Industry Practices Regarding Increases In Rates Relating To Customer Defaults 4

B. Truth In Lending Act Disclosure Requirements 8

C. Industry Disclosure Practices And Recent Revisions To Regulation Z 11

D. Proceedings Below 14

REASONS FOR GRANTING THE PETITION 18

I. THERE IS AN IRRECONCILABLE CIRCUIT SPLIT 18

II. THE DECISION BELOW IS WRONG 23

A. The Ninth Circuit Ignored The Text Of The Regulation And Accompanying Official Staff Commentary 23

TABLE OF CONTENTS—Continued

Page

B. The Ninth Circuit Improperly Discarded The Federal Reserve Board's Statements That Change-In-Terms Notices Were Not Required For Implementation Of Default Rates 27

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Anderson Bros. Ford v. *Valencia*, 452 U.S. 205 (1981) 30

Auer v. *Robbins*, 519 U.S. 452 (1997) 31

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 30

Evans v. *Chase Bank USA, N.A.*, 267 Fed. Appx. 692 (9th Cir. 2008) (unpublished) 15, 16

Evans v. *Chase Manhattan Bank USA, N.A.*, No. 05-3968, 2006 WL 213740 (N.D. Cal. Jan. 27, 2006) 15, 22

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 31

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 8, 20, 30, 33, 34

Grasso v. *First USA Bank*, 713 A.2d 304 (Del. Sup. Ct. 1998) 6

Marquette National Bank v. *First of Omaha Service Corp.*, 439 U.S. 299 (1978) 21

Martin v. *Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991) 30

Penner v. *Chase Bank USA, N.A.*, No. C06-5092 FDB, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006) 15, 22

Shaner v. *Chase Bank USA, N.A.*, 570 F. Supp. 2d 195 (D. Mass. 2008) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Swanson v. *Bank of America, N.A.*, 563 F.3d 634 (7th Cir. 2009) 18, 19

Swanson v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009) 18, 19, 20

Swanson v. *Bank of America, N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008) 22

Thomas Jefferson University v. *Shalala*, 512 U.S. 504 (1994) 30

Williams v. *Washington Mutual Bank*, No. 07-2418, 2008 WL 115097 (E.D. Cal. Jan. 10, 2008) 22

DOCKETED CASES

Anderson v. *HSBC Bank Nevada, N.A.*, No. 09-cv-04271 (C.D. Cal.) 22

Curran v. *Chase Bank USA, N.A.*, No. 09-cv-03417 (C.D. Cal.) 22

Frederick v. *FIA Card Services, N.A.*, No. 09-cv-03419 (C.D. Cal.) 22

Grimes v. *Chase Bank USA, N.A.*, No. 06-cv-00742 (C.D. Cal.) 22

Kapelner v. *U.S. Bank National Ass'n, ND*, No. 09-cv-04061 (C.D. Cal.) 22

Shaner v. *Chase Bank, USA, N.A.*, No. 09-1157 (1st Cir.) 21

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

15 U.S.C.
§§ 1601 *et seq.* 8
§ 1640 ..... 8, 23

28 U.S.C.
§ 1254 2
§ 1291 2
§ 1331 2

Pub. L. No. 111-24, 123 Stat. 1734 (2009) 14

5 Del. Code § 952 ..... 6, 7

Nev. Rev. Stat. § 97A.140 7

S.D. Codified Laws
§ 54-11-10 7
§ 54-11-11 7

12 C.F.R.
Part 226 8
§ 226.5 ..... 9, 24
§ 226.6 ..... *passim*
§ 226.7 11
§ 226.9 ..... *passim*

12 C.F.R. pt. 226, supp. I
cmt. ¶ 5(c)-1 ..... 9, 24
cmt. ¶ 6(a)-11 25
cmt. ¶ 6(a)(2)-2 23
cmt. ¶ 6(a)(2)-11 ..... 9, 23
cmt. ¶ 7(d)-2 11
cmt. ¶ 9(c)-1 ..... *passim*
cmt. ¶ 9(c)(1)-3 ..... 10, 11, 17, 19, 26

72 Fed. Reg. 32,948 (June 14, 2007) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

74 Fed. Reg.
5,244 (Jan. 29, 2009) 8, 13, 29
5,498 (Jan. 29, 2009) 28
36,077 (July 22, 2009) 14, 29

LEGISLATIVE MATERIALS

S. Rep. No. 93-278 (1973) 20

OTHER AUTHORITIES

Furletti, Mark, *Credit Card Pricing Developments and Their Disclosure* (Federal Reserve Bank of Philadelphia Jan. 2003) 5

IN THE

Supreme Court of the United States

No. 09-

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Chase Bank USA, N.A. ("Chase"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) is reported at 559 F.3d 963. The court of appeals order denying the petition for rehearing and rehearing *en banc* (App. 49a-50a) and the district court opinion (App. 37a-47a) were not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009, and a timely petition for rehearing and rehearing *en banc* was denied on June 16, 2009. The district court had jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction to review the district court decision under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

This case involves the following regulations issued by the Federal Reserve Board:

> 12 C.F.R. § 226.6. Initial disclosure statement.
>
> The creditor shall disclose to the consumer, in terminology consistent with that to be used on the periodic statement, each of the following items, to the extent applicable:
>
> (a) *Finance charge.* The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows:
>
> * * *
>
> (2) A disclosure of each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. When different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates apply shall also be disclosed.

12 C.F.R. § 226.6(a) (footnotes omitted).

> 12 C.F.R. § 226.9. Subsequent disclosure requirements.
>
> (c) *Change in terms—(1) Written notice required.* Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.

12 C.F.R. § 226.9(c)(1).

STATEMENT OF THE CASE

The Federal Reserve Board's Regulation Z, implementing the Truth in Lending Act, requires credit card issuers to state, in "initial disclosures," terms that may result in increased interest rates such as floating rate terms or default rate terms. 12 C.F.R. § 226.6(a)(2). Regulation Z separately requires that credit card issuers provide "subsequent disclosures," in an appropriate form, when "any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1). Confusing the two provisions, by mistakenly considering the *implementation* of an already-disclosed term regarding rate increases to constitute a *change* in terms, a divided panel of the Ninth Circuit held that credit card issuers must provide "subsequent

disclosures" under § 226.9(c) for rate increases, even when the increase is merely an implementation of prior default terms already disclosed in accordance with § 226.6. In so holding, the Ninth Circuit failed to follow the Board's Official Staff Commentary to Regulation Z, which prescribes that "No notice of a change in terms need be given if the specific change is set forth initially," 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1, and disregarded explanations published by the Board in the Federal Register detailing the operation of its regulations. In doing so, the Ninth Circuit panel majority departed from every other federal court (indeed, every other federal judge) to have considered the same issue, including a prior Ninth Circuit panel in an unreported decision, resulting in an irreconcilable split with the Seventh Circuit. The court of appeals decision is incorrect and should be reversed.

A. Industry Practices Regarding Increases In Rates Relating To Customer Defaults

This case concerns the applicability of Truth In Lending Act disclosures to the common practice in the credit card industry of applying an increased periodic interest rate to an account after a customer's late payment or other default, under a contractual default rate provision (also referred to as a penalty rate provision). Credit card issuers often consider such rate increases necessary to compensate for the increased risk revealed by such borrower behavior.

A credit card account relationship between a bank and its customer may endure for many years, during which circumstances can change. Two principal ways exist by which credit card issuers customarily are authorized to adjust their rates over the course of an account relationship in response to changed circum-

stances. The first is by terms in the original cardholder agreement under which the parties agree, *ex ante*, that different periodic rates may be applied in the future in specified circumstances (*e.g.*, a floating rate tied to an index, or default rates specified in the event of a cardholder default). For example, a credit card agreement may provide as follows:

> We may increase the annual percentage rate on all balances to a default rate of up to 24.99 percent ... if you fail to make a payment to us or any other creditor when due, you exceed your credit line, or you make a payment to us that is not honored by your bank.

Furletti, *Credit Card Pricing Developments and Their Disclosure* 8-9 (Federal Reserve Bank of Philadelphia Jan. 2003) (ellipsis in original; emphasis omitted; internal quotation marks omitted). The major credit card issuers include such provisions in their contracts in one form or another.[1] If the cardholder defaults, the issuer

---

[1] Citibank (South Dakota) N.A. Complete Terms Page, *available at* https://www.accountonline.com/ACQ/DisplayTerms?sc=4DNZ1ST98000MDK730W&app=UNSOL&siteId=CB&langId=EN&BUS_TYP_CD=CONSUMER&DOWNSELL_LEVEL=2&BALCON_SC=&B=M&DOWNSELL_BRANDS=M,M,&DownsellSourceCode1=4DNZ2SV98000MDK730W&B1=M&DownsellSourceCode2=4DNZ3SU98000MDK730W&B2=M&t=t&d=&uc=3KP&AMEX_PID_AF_CODE=&AAPID=&productConId=BM4DNZ1 (last visited Sept. 14, 2009); Chase Bank USA, N.A. Pricing & Terms, *available at* https://www.firstusa.com/cgi-bin/webcgi/webserve.cgi?pdn=pt_chase_con_2009_1&card=CKD3&page_type=apptermns (last visited Sept. 14, 2009); HSBC Bank Nevada, N.A., *available at* http://www.disclosure.hsbccreditcard.com/1/2/media/disclosure?cmd_lpage=&indicator=HS039&media=H5IM112JAX0803000458XXTHX&WT.ac=CRS_IM000458 (last visited Sept. 14, 2009); FIA Card Services, N.A. Terms and Conditions, *available at*

increases the rate *pursuant to* these initially disclosed terms of the contract.

An alternative method is for the card issuer to amend the existing terms of its contract with the cardholder to apply new price terms. Credit card accounts are at-will lending arrangements, and credit card agreements invariably include a provision (commonly referred to as a change-in-terms or reservation-of-rights provision) allowing the card issuer to amend the price and other terms of the arrangement as a condition of continuing to extend credit. *See, e.g.*, n.1, *supra*. States frequently address such change-in-terms practices explicitly under banking statutes, *e.g.*, 5 Del. Code § 952, and courts routinely enforce them under accepted principles of contract, *e.g.*, *Grasso* v. *First USA Bank*, 713 A.2d 304 (Del. Super. Ct. 1998).

When changes in circumstances render it appropriate—whether those changes are specific to the cardholder (*e.g.*, indications that the cardholder is less creditworthy) or not (*e.g.*, changes in the general economy)—banks may exercise their change-in-terms authority. For example, if a credit card issuer decides to change the index on which a floating rate is based, it may utilize its change-in-terms authority to raise the allowable periodic rates on the account. Issuers may also use their change-in-terms authority to increase a rate based on a default if, for example, the agreement contains no default rate term or the agreement does, but the bank concludes that the maximum authorized

---

http://www.bankofamerica.com/creditcards/eproducts/view/context/tc_ccpopup.cfm?cid=2007331&aolnEnv=disclosures.bankofamerica.com&card_name=BankAmericard%20Cash%20Rewards"%20Visa%20Signature%20Card&lc=en_US (last visited on Sept. 14, 2009).

default rate is inadequate to cover the additional lending risk from a particular cardholder's default.

The two different ways in which rates may be increased have different substantive legal effects and practical ramifications. When a card issuer increases rates pursuant to an *existing contractual term*—whether a floating rate term, default rate term, or other similar term—the card issuer's legal right to increase the rate when the triggering event occurs is already established and no new agreement by the cardholder is required. In light of the cardholder's existing contractual agreement to the rate increase, there is no contractual obligation on the card issuer to delay implementation of the new rate, so the increase may be immediately applied. Typically, the increased rate has been effective, under the parties' contract, as of the first day of the billing period during which the triggering event occurs, and applies to all existing balances.

By contrast, when a card issuer seeks to increase rates by *changing the terms* of the existing cardholder agreement, principles of contract law require some kind of actual or legally implied agreement by the cardholder to the new terms. Under Delaware banking law, for example, the bank must first provide 15 days' written notice to the cardholder of any amendment to increase the periodic rate, notifying the cardholder of the proposed amendment and his right to opt out of it, and the bank may not apply the increased rate to the existing account balances of any cardholder who opts out of the amendment and abstains from use of the account for new transactions. *See* 5 Del. Code § 952. Other state banking laws are similar. *See, e.g.*, Nev. Rev. Stat. § 97A.140; S.D. Codified Laws §§ 54-11-10, -11.

B. Truth In Lending Act Disclosure Requirements

The Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, imposes, as a matter of federal law, a regime of standardized disclosure obligations on creditors relating to credit transactions with consumers. Rulemaking authority is vested in the Federal Reserve Board, which has implemented the statute through Regulation Z, 12 C.F.R. part 226. Regulation Z is supplemented by an Official Staff Commentary, *id.* supp. I, good faith compliance with which is a defense in a suit asserting liability based on a violation of the Act or Regulation. 15 U.S.C. § 1640(f). The disclosure practices governed by Regulation Z are both broad and intricate, with the result that this single Regulation and Commentary alone take up more than 240 pages in the Code of Federal Regulations. The Board also frequently publishes revisions, together with explanations, of both the Regulation and Commentary, in order to address new developments, uncovered ambiguities, and changes in law or policy. *See, e.g.*, 74 Fed. Reg. 5,244 (Jan. 29, 2009). From 2004 to the date of this petition, for example, notices concerning revisions to Regulation Z and the Commentary, including explanatory material, have consumed some 1039 pages in the Federal Register. This Court has accorded substantial deference to the Board's expertise in Regulation Z matters. *See generally Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).

Two provisions of Regulation Z are of primary relevance to this case. The first, 12 C.F.R. § 226.6, governs the "initial disclosures" that credit card issuers are required to provide at the outset of the credit relationship, before any transaction on the account has occurred. In relevant part, § 226.6 requires creditors to

disclose "each periodic rate that *may* be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2) (emphasis added). This disclosure obligation includes default rates: "If the initial rate may increase upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose the initial rate and the increased penalty rate that may apply." Comment ¶ 6(a)(2)-11. As with all disclosures, this disclosure of the periodic rates that may be used under the contract must "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c); *see also* Comment ¶ 5(c)-1 ("The disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures.").

The second provision at issue concerns "changes in terms." 12 C.F.R. § 226.9(c). It generally mandates that "[w]henever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected." *Id.* § 226.9(c)(1). Section 226.9(c) disclosures, which are required when there is a *change* in one or more of the terms that § 226.6 requires creditors to disclose initially, effectively operate as a new round of "initial disclosures" for the changed term. Thus, a § 226.9(c) change-in-terms notice has not been required for rate increases that are provided for in the cardholder's "initial" terms—such as implementation of floating rate terms, or application of a default rate for failing to keep a required balance—but a change-in-terms notice is required if the card issuer invokes its unbound discretion under a reservation-of-rights provision to amend the contract to adopt rates different from the existing contract terms:

> No notice of a change in terms need be given if the specific change is set forth initially, such as: Rate increases under a properly disclosed variable-rate plan ... or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate).

Comment ¶ 9(c)-1.

Ordinarily, where Regulation Z required the creditor to send a change-in-terms notice, the creditor was required to send it 15 days in advance of the effective date of the change. 12 C.F.R. § 226.9(c)(1). (Under amendments to the Regulation, that time is now 45 days, as discussed below.) If, however, the creditor initiated a contractual change in terms because of a cardholder's default or delinquency (again, as distinct from implementation of existing default rate terms), then so far as Regulation Z was concerned the 15-day advance notice period was inapplicable and the creditor needed only to send the notice before the effective date of the change. *Id.* Thus, in the event of a default, if the bank were to *amend* the cardholder agreement to provide for a rate *not already authorized* by the initial cardmember agreement, then notice would be required but the creditor need not send it 15 days in advance. As stated by Comment ¶ 9(c)(1)-3:

> *3. Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change— ... [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

Comment ¶ 9(c)(1)-3.

A credit card issuer's "initial disclosures"—and, for that matter, any change-in-terms disclosure—do not necessarily identify the particular rates that will be applicable to a card account at a particular time. Regulation Z requires these disclosures to identify all rates that "may" apply under the terms of the parties' agreement, whereas the rate that does apply in any instance may depend on which credit features a cardholder utilizes, external events (*e.g.*, on a floating rate plan), cardholder behavior, or other account circumstances. Under Regulation Z, the ongoing disclosure to the cardholder of which of the applicable rates (or the rate within the applicable range of rates) is being applied to the account, pursuant to the cardholder agreement, is performed by "periodic statements," typically rendered monthly. 12 C.F.R. § 226.7(d). The periodic statement identifies transactions on the account and discloses each rate "in effect during the billing cycle reflected on the periodic statement." Comment ¶ 7(d)-2.

C. Industry Disclosure Practices And Recent Revisions To Regulation Z

Based on substantive contract and banking law, and in accordance with Regulation Z requirements, it has long been industry practice for credit card issuers

to apply default pricing terms that are set forth in the cardholder agreement and initial disclosures without providing a change-in-terms notice when the default rates become applicable. Because the cardholder already has agreed to an increase up to the default rate as part of the original contract, there is no need to obtain further assent or update the § 226.6 initial disclosures. In contrast, where a card issuer changes the terms of the underlying agreement, notice is needed both to secure the cardholder's agreement to the contract modification and to update the underlying documents, including the § 226.6 initial disclosures.

This case is governed by the provisions of Regulation Z described above. Earlier this year, the Federal Reserve Board revised the Regulation twice, first to implement certain changes in its regulatory policy, and second to implement certain statutory changes enacted by Congress this year. Following these 2009 changes, Regulation Z now requires advance notice when a card issuer is implementing an increased periodic rate pursuant to a default rate term, even where the term had already been the subject of "initial disclosures" at the time of contract formation.

The first of the changes to Regulation Z was initiated by the Board through a rulemaking process begun in late 2004. This amendment of Regulation Z was a product of a change in policy by the Board. In the course of explaining its change, the Board stated that, under the regulation as it existed at the time pertinent to this case, Regulation Z authorized the longstanding industry practice—that is, implementation of a contractual default rate term without a change-in-terms notification. In a 2007 Advance Notice of Proposed Rulemaking ("ANPR"), for instance, the Board stated:

> [N]o change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs.

72 Fed. Reg. 32,948, 33,009 (June 14, 2007).

The Board stated that it changed its policy because consumer testing and comments revealed that advance notice of default rate implementation would benefit consumers and prevent undue surprise. The new regulation, adopted in January 2009 and due to become effective in mid-2010, changed the timing requirement in § 226.9(c) to require that notices of *changes in terms* involving rate increases due to default be provided 45 days in advance, and also promulgated an entirely new subsection, § 226.9(g), to require 45 days' advance notice of *implementations of existing default rate terms* of the cardholder agreement. *See* 74 Fed. Reg. at 5,414-5,415.

Before the Board's amended regulation took effect, Congress passed the Credit Card Accountability Responsibility and Disclosure Act ("Credit CARD Act"), which requires 45 days' advance notice before any increase in the annual percentage rate except where the increase occurs because of the expiration of an introductory period, the operation of an index, or a failure to

comply with a workout arrangement. Pub. L. No. 111-24, § 101(a), (b) 123 Stat. 1734, 1735, 1736 (2009). In July 2009, the Board adopted new regulations to implement the Credit CARD Act, but retained separate provisions, as in the January 2009 rule, applicable to (1) changes in rate terms and (2) implementations of previously disclosed default rate terms. *See* 74 Fed. Reg. 36,077, 36,095 (July 22, 2009) (promulgating new versions of 12 C.F.R. § 226.9(c), (g), effective Aug. 20, 2009).

These regulatory amendments do not themselves apply to this case, or to the other cases presently pending in the lower courts (*see* n.4, *infra*), and accordingly do not moot the issues presented here or their legal significance. For simplicity, all citations to Regulation Z and the Commentary in this petition are to the versions that were in force until August 20, 2009, unless specifically noted.

D. Proceedings Below

Respondent's complaint. Respondent James McCoy ("respondent") filed this putative class action in California state court to challenge Chase's practice of applying its default pricing terms after a cardholder's default under the terms of the cardholder agreement, without providing a § 226.9(c) change-in-terms notice. The cardholder agreement governing respondent's account provided that his entitlement to "Preferred" rates was contingent on his avoidance of specified events of default. App. 20a-21a, n.1 (Cudahy, J., dissenting). In the event of such a default, Chase was authorized to impose different rates "up to the maximum Non-Preferred rate described in the Pricing Schedule." *Id.* Following respondent's default, Chase increased his interest rate in accordance with the contract. App. 2a.

Respondent sued, alleging that Chase violated Regulation Z by "failing to notify its customers of increases in interest rates on or before the effective date of the change." App. 41a (citing the Second Amended Complaint). Petitioner also advanced state law claims not pertinent here. *See* App. 38a.

The district court decision. Chase removed the action to the United States District Court for the Central District of California, and subsequently moved pursuant to Rule 12(b)(6) to dismiss all claims. App. 37a. As to the Regulation Z claim, Chase contended that the increased rate constituted an implementation of—not a change to—the contractual terms governing the account and set forth in Chase's "initial disclosures," and that the Commentary specifically provided that "[n]o notice of a change in terms need be given if the specific change is set forth initially." Comment ¶ 9(c)-1.

The district court granted Chase's motion to dismiss, agreeing with every other court to have considered the TILA issue at that time, and concluding that no change-in-terms notice was required in connection with "the implementation of terms [that had previously been] explicitly disclosed." App. 42a; *see also Evans* v. *Chase Bank USA, N.A.*, No. C-05-3968 SC, 2006 WL 213740 (N.D. Cal. Jan. 30, 2006); *Penner* v. *Chase Bank USA, N.A.*, No. C-06-5092 FDB, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006). Respondent appealed.

The Ninth Circuit decision. Before the Ninth Circuit decided the appeal in this case, it confronted another case involving the same issue, brought by the same counsel, also against Chase, based on a virtually identical cardholder agreement—*Evans* v. *Chase Bank USA, N.A.*, 267 Fed. Appx. 692 (9th Cir. 2008) (unpublished). The *Evans* panel rejected the § 226.9(c) claim

unanimously, holding that Regulation Z does not require sending "change-in-terms notices prior to implementing discretionary interest rate increases after default." *Id.* at 693.

Approximately one year later, after having stayed this case pending a decision in *Evans*, a different panel of the Ninth Circuit decided the appeal herein. The two-judge majority explicitly rejected the *Evans* decision, and reached a contrary result. *See* App. 12a-14a. Judge Cudahy of the United States Court of Appeals for the Seventh Circuit, sitting by designation, dissented. App. 18a-33a.

In reaching its decision, the panel majority acknowledged that Chase had disclosed its default rate terms in its operative "initial disclosures," as 12 C.F.R. § 226.6(a)(2) requires. App. 7a-8a. It also acknowledged that § 226.9(c) requires a change-in-terms disclosure only "[w]henever any term required to be disclosed under § 226.6 is changed." App. 3a. But the panel majority declined to discuss how Regulation Z's language could be read to apply to the implementation, rather than a change, of the rate terms provided in the initial disclosures. The opinion did not conclude that the application of a default rate was occasioned by, or signaled, any change in the terms of the credit agreement between the parties.

The panel majority also gave short shrift to the initial section of the Commentary relating to change-in-terms notices, Comment ¶ 9(c)-1, titled "Change in Terms," whose first sentence states: "No notice of a change in terms need be given if the specific change is set forth initially ...." Instead, the panel majority focused on a provision of the Commentary, noted above, that by its terms concerns the timing of change-in-

terms notices—Comment ¶ 9(c)(1)-3, titled "*Timing—advance notice not required.*" App. 4a-5a. Chase had argued that this provision was not relevant because it dealt only with timing matters, and that Comment ¶ 9(c)-1 made clear that no notice was required to begin with. However, the panel majority held that any increase in a periodic rate resulting from a default, even if implemented pursuant to the terms of the cardholder agreement, requires a "change-in-terms" notice, on the ground that "[t]he plain-meaning of Comment 3 is to require notice when a cardholder's interest rates increase because of a default." App. 4a.

In reaching its conclusion, the panel majority dismissed the fact that, in part based on the Federal Reserve Board's statements in the 2007 ANPR quoted above and other Federal Register notices related to the recent rulemakings, the *Evans* panel and every district court to have decided the issue had reached the opposite conclusion. App. 11a-12a. The panel majority declined to defer to the Board's explanations of its regulation, on the ground that they were "tersely worded 'interpretations' of existing law [that were] incidental to the purpose of the agency action, ... stated in conclusory fashion, ... themselves ambiguous, and have now been superseded." App. 13a, n.5.

In dissent, Judge Cudahy criticized the majority for failing to defer to the Board's clear explanation of 12 C.F.R. § 226.9(c) in its 2007 rulemaking, and concluded that under existing Supreme Court precedent the Board's opinion regarding the correct interpretation of Regulation Z is entitled to deference, "even if that opinion appears in an ANPR rather than Official Staff Commentary." App. 27a (Cudahy, J., dissenting). Moreover, the dissent would have found that the contractual default rate provision alone gave respondent

sufficient notice of the default conditions and rates that could be applied, and that "[t]he interpretation of Regulation Z shared by Chase and the Board ... [is] consistent with the purpose of TILA." App. 32a (Cudahy, J., dissenting).

Chase petitioned for panel rehearing and rehearing *en banc*, noting that the Seventh Circuit had issued a decision directly rejecting the panel majority's analysis. *See Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009). The Ninth Circuit denied the petition. App. 49a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit decision creates an irreconcilable circuit split that undermines the uniform operation of the Truth in Lending Act by threatening to impose substantial liabilities on credit card issuers who have long followed industry practice as authorized by Regulation Z and the Official Staff Commentary. The panel majority misconstrued the Regulation, Commentary, and repeated Federal Reserve Board statements made during a rulemaking on the precise practice at issue in this case. By refusing to accord the Board proper deference, the Ninth Circuit decision injects substantial uncertainty into a highly technical regulatory regime, the very point of which is to standardize disclosure practices, to the detriment of the entire credit card industry.

I. THERE IS AN IRRECONCILABLE CIRCUIT SPLIT

The petition for certiorari should be granted because there is a concrete and irreconcilable split between the Seventh and Ninth Circuits that undermines the uniform application of the Truth in Lending Act.

The Seventh Circuit handed down its *Swanson* decision three days after the Ninth Circuit released *McCoy*, and reached the exact opposite conclusion about Regulation Z's requirements for implementation of default rate provisions specified in the parties' cardholder agreement and initial disclosures. Relying on Comment ¶ 9(c)-1, *Swanson* held that "lenders need not give separate notice before applying pre-authorized rate increases." *Swanson*, 559 F.3d at 656. When the plaintiff in *Swanson* alerted that court to the Ninth Circuit's decision in a petition for rehearing, the Seventh Circuit explicitly and flatly rejected the Ninth Circuit's view that the Comment concerning the *timing* of change-in-terms notices—Comment ¶ 9(c)(1)-3—is somehow relevant to the question of *whether* a change-in-terms notice is required:

> [C]omment 3 addresses when notices that are required by the regulation [as understood in Comment ¶ 9(c)-1] must be sent. Nothing in comment 3, which says that notice need not be 'advance' in defined circumstances, provides that notice is required in the first place.

Swanson, 563 F.3d at 635. The Seventh Circuit also concluded that it was bound by Supreme Court precedent to "honor the [Federal Reserve] Board's commentary on its rules ... by taking the Board at its word that [the 2009 rulemaking] makes a real change" when it requires credit card issuers in the future to provide notice of the implementation of default rates. *Id.* at 657.

The decision below directly conflicts with the Seventh Circuit's *Swanson* decision, and the conflict is irreconcilable. Petitions for rehearing were filed by the losing party in each case, alerting each court of the other's decision, and each court has stuck to its original

decision. Indeed, in response to the plaintiff's petition for rehearing, the Seventh Circuit issued its second opinion specifically elaborating its grounds, refuting the Ninth Circuit's reasoning in *McCoy*, and pointedly noting agreement with the Ninth Circuit's earlier decision in *Evans*. *Swanson*, 559 F.3d at 635. For its part, the Ninth Circuit, although made aware of both Seventh Circuit opinions in *Swanson*, denied rehearing and rehearing *en banc* in *McCoy*. App. 49a.

This conflict concerns the legality of a significant and universal practice, followed in the industry based on guidance from its statutorily designated regulator, the Federal Reserve Board, and thus potentially affects every credit card account in the nation. The conflict presents a serious problem in the administration of the Truth in Lending Act. The statute was enacted to establish standardized disclosure rules for a nationwide consumer credit market. As this Court noted in *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), TILA is a "'highly technical'" regime under which creditors need "sure" rules in order to avoid potentially significant liabilities. *Id.* at 566-567 (quoting S. Rep. No. 93-278, at 13 (1973)). In recognition of this need, the statute itself, and its legislative history, mark a "decided preference" by Congress for resolving interpretive issues arising under the Act and Regulation Z by uniform administrative decision, rather than "piecemeal through litigation," in order to assure "a coherent and predictable body of technical rules" under the statute. *Id.* at 568-569 & n.10.

The circuit split, and the Ninth Circuit's decision to disregard the Federal Reserve Board's 2007 explanation of the existing regulatory requirements, leaves the

lower federal courts outside the Ninth and Seventh Circuit uncertain of what standard to apply,[2] and creates important inconsistencies in the treatment of cardholders depending on the federal venue in which a particular suit proceeds. Credit card issuers accounting for the vast bulk of the market operate nationwide programs and are susceptible to suit in any location—potentially leading to the anomaly, for example, that the *McCoy* case, if certified as a nationwide class action, could result in application of the Ninth Circuit rule to Seventh Circuit cardholders.[3]

Further percolation in the lower courts would serve no salutary purpose. No further development of the legal issues by the lower courts is necessary in order to illuminate the controversy, in light of the detailed opinions issued by the Ninth and Seventh Circuits and the clear-cut nature of the matter. Moreover, it is unlikely that, in view of the *McCoy* result, further suits will be initiated outside the Ninth Circuit. In the

---

[2] The First Circuit is currently weighing the same TILA issues in a similar litigation against Chase filed by respondent's counsel. That court asked the Federal Reserve Board to submit an amicus brief stating its views, and the Board has stated its intent to file such a brief. Order of Court 2, *Shaner* v. *Chase Bank, USA, N.A.*, No. 09-1157 (1st Cir. filed Aug. 4, 2009); Ltr. from S. Alvarez to Clerk of Court, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. filed Aug. 25, 2009). Following the *McCoy* panel's refusal to defer to the Board's explanation in its 2007 Federal Register notice, Chase urged the Ninth Circuit likewise to request the Board's views in connection with rehearing but the court denied the rehearing petition without comment. App. 49a.

[3] National banks are federally authorized to charge uniform interest rates to customers across the nation. *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

six months since the Ninth Circuit's decision was issued, similar suits have been filed against credit card issuers representing an estimated 50 percent of the credit card industry—all in the Ninth Circuit.[4]

Moreover, the recent rulemaking that has changed notification procedures going forward as of August 20, 2009, does not moot the legal question whether card issuers should be held liable for damages for conforming to the industry practice that prevailed under the prior regulation. Nor does that rulemaking solve the conflict between the courts of appeals: indeed, the Ninth Circuit refused to defer to the Board's 2007 explanation of the regulatory requirements at issue here, precisely (and wrongly) because it was set forth in the context of explaining that the Board was *changing* the rules.

---

[4] *See Anderson* v. *HSBC Bank Nevada*, N.A., No. 09-cv-04271 (C.D. Cal.); *Curran* v. *Chase Bank USA, N.A.*, No. 09-cv-03417 (C.D. Cal.); *Frederick* v. *FIA Card Services, N.A.*, No. 09-cv-03419 (C.D. Cal.); *Grimes* v. *Chase Bank USA, N.A.*, No. 06-cv-00742 (C.D. Cal.); *Kapelner* v. *U.S. Bank Nat'l Ass'n ND*, No. 09-cv-04061 (C.D. Cal.). Before the Ninth Circuit's decision in *McCoy*, counsel for respondent had filed similar suits in the First and Seventh Circuits, as well as the Ninth Circuit, against a number of credit card issuers. In every other case in which there has been a decision on the merits of the Regulation Z issue on dispositive motions, the court has dismissed the case. *See Swanson* v. *Bank of America, N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir. 2009); *Evans* v. *Chase Manhattan Bank USA, N.A.*, No. 05-3968, 2006 WL 213740 (N.D. Cal. Jan. 27, 2006), *aff'd*, 267 Fed. Appx. 692 (9th Cir. 2008); *Shaner* v. *Chase Bank USA, N.A.*, 570 F. Supp. 2d 195 (D. Mass. 2008), *appeal pending*, No. 09-1157 (1st Cir.); *Williams* v. *Washington Mut. Bank*, No. 07-2418, 2008 WL 115097 (E.D. Cal. Jan. 10, 2008), *appeal pending*, No. 08-15296 (9th Cir.); *Penner* v. *Chase Bank USA, N.A.*, No. C06-5092, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006), *appeal pending*, No. 06-35726 (9th Cir.). *McCoy* is the sole exception.

App. 13a, n.5. Given the universality of the industry practice under challenge, the potential availability of substantial damages under TILA, 15 U.S.C. § 1640(a), and the scope of credit card commerce, extensive litigation over the matter here in conflict is certain to continue absent intervention by this Court. Indeed, in light of the number of accounts at issue in the pending class actions against industry members, and the amount of the finance charges at issue, the damages sought by plaintiffs if the *McCoy* rule is allowed to become the *de facto* standard despite the circuit conflict, are sure to be very substantial.

II. THE DECISION BELOW IS WRONG

The petition should also be granted because the panel majority below fundamentally misinterpreted Regulation Z and the Commentary on an important matter and refused to accord the Board's own statements their proper meaning and deference.

A. The Ninth Circuit Ignored The Text Of The Regulation And Accompanying Official Staff Commentary

The Ninth Circuit panel majority ignored the plain text of the regulation at issue, which requires a change-in-terms notice when the parties' contract obligations are *changed*, not when they are *implemented* in accordance with their existing disclosed terms. Section 226.9(c) requires a change-in-terms notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1). Section 226.6 in turn requires disclosure of "each periodic rate that may be used to compute the finance charge." *Id.* § 226.6(a)(2). For example, it requires disclosure of all floating rate terms (*see* Comment ¶ 6(a)(2)-2) and default rate terms (*id.* ¶ 6(a)(2)-11), that *may* be applied to the account,

including rates not being applied to account balances in present circumstances. When circumstances change—for example, market index rates increase, or the cardholder defaults—implementation of the floating or default rates "initially disclosed" under § 226.6(a)(2) may bring different rates to bear on unpaid balances carried on the account, without any change of the contractual terms governing the account. Because the circumstances bringing these rates to bear do not constitute a change in the already disclosed contractual terms of the account, but rather an implementation of those terms, there is no "change in terms" to disclose. Nothing in § 226.9(c) states that a new disclosure notice is due when "term[s] required to be disclosed under § 226.6" are implemented in accordance with the "initial disclosures" of the parties' agreement.

On the contrary, as the Regulation and Commentary state, § 226.6 "initial disclosures" are to "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 226.5(c), which "is presumed to be contained in the contract," Comment ¶ 5(c)-1—that is, the cardholder agreement. The implementation of the default rate provision contained in the cardholder agreement, and already set forth in the "initial disclosures" of all rates that "may" apply to the account, as § 226.6(a)(2) requires, does not constitute an amendment of "the terms of the legal obligation between the parties" as set forth in the cardholder agreement. Accordingly, no change-in-terms notice was required by § 226.9(c).

The key Commentary provision addressing change-in-terms notices itself states that "No notice of a change in terms need be given if the specific change is set forth initially"—that is, in the "initial disclosures." Comment ¶ 9(c)-1. Chase did set forth its default rate

terms initially, just as the Commentary envisions. The cardholder agreement "disclose[d] the specific event or events" of default "that may result in the increased rate," and also disclosed the specific "increased penalty rate that may apply" in the event of such defaults. Comment ¶ 6(a)-11.[5] The Commentary says, as an illustrative example, that no change-in-terms notice is required for "an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Id.* Similarly here, in the case of a default rate term, where an increase occurs because the consumer has been under an agreement to pay on time in order to keep what Chase refers to as "Preferred Rates," and the consumer fails to do so, no change-in-

---

[5] The panel majority concluded that Chase's default rate provision was "like" a general reservation of rights to amend the cardholder agreement in the sense that Chase retained a certain degree of discretion to charge *less* than the rate specified by the agreement. App. 8a-9a. But respondent himself acknowledged that he "did receive a rate increase to the maximum." Appellant's Opening Br. 30, *McCoy* v. *Chase Manhattan Bank USA, N.A.*, No. 06-56278 (9th Cir. filed May 30, 2008). Regardless, Chase did not have the power to increase rates as a matter of discretion, because the invocation of default rates was limited to specific circumstances, and the maximum default rate was specified. The panel did not conclude that Chase's implementation of its default rate terms involved any modification to the cardholder agreement, or that any exercise of grace by the bank to charge rates lower than allowed would constitute the equivalent of a contract amendment under the state statutes and contract principles applicable to credit card agreements. Finally, § 226.9(c)(2) is explicit that no change-in-terms notice is required for "a reduction of any component of a finance or any other charge."

terms notice is required because the rates applicable in the case of such defaults have been "set forth initially."

The panel majority's holding was, for these reasons, contrary to the plain language of the Regulation and Commentary that prescribes when change-in-terms notifications are required by TILA. Comment ¶ 9(c)(1)-3, on which the panel majority relied for its contrary conclusion (App. 4a-5a), is off point: It addresses timing of a change-in-terms notice, if one is due; it does not address whether a change-in-terms notice is required in the first place. Comment ¶ 9(c)(1)-3 is subordinate in the structure of the Commentary to Comment ¶ 9(c)-1, discussed above, which states that no change-in-terms notice is required for matters covered in the "initial disclosures." The subject of Comment ¶ 9(c)(1)-3 is expressly limited to matters of timing, as reflected by its title: "*3. Timing—advance notice not required.*" The Comment thus says that if a change-in-terms notice is due as a result of "an increased periodic rate ... attributable to the consumer's delinquency or default"—*i.e.*, if the card issuer has invoked its general reservation of rights to amend the existing terms of the card agreement as a response to a consumer's delinquency—then the requisite change-in-terms notice can be provided contemporaneously with the effective date of the contract modification rather than the normal 15 days in advance. Nothing in the title, text, or structure of Comment ¶ 9(c)(1)-3 indicates that its meaning is any more than this. Nothing in the provision states specifically, or implies, that it should be read to supersede the general directive of the regulation itself, or of Comment ¶ 9(c)-1, that a change-in-terms notice is required only when the terms of the contractual obligations already disclosed in the "initial disclosures" have changed.

B. The Ninth Circuit Improperly Discarded The Federal Reserve Board's Statements That Change-In-Terms Notices Were Not Required For Implementation Of Default Rates

The *McCoy* panel majority forthrightly—and wrongly—refused to defer to the Federal Reserve Board's explanations of its regulatory requirements, set forth in Federal Register rulemaking statements. *See* App. 13a, n.5. The Board's statements addressed the precise issue in controversy here, saying that, under existing regulatory requirements, a credit card issuer "need not provide a change in terms notice" upon the implementation of a default rate "[b]ecause the circumstances of the increase are specified in advance in the account agreement." 72 Fed. Reg. at 33,009. Nevertheless, the panel majority discarded the Board's interpretations, saying that "we defer to the FRB's Official Staff Commentary, not incidental descriptions of current law contained in an [Advance Notice of Proposed Rulemaking]." App. 13a n.5. The panel majority's refusal to defer to the Board's officially published interpretation of its own regulatory requirements, in the course of its rulemakings, was a profound departure from established principles, undermining the Board's continuing authority and ability to carry out its regulatory mission. This Court should grant certiorari to correct that departure.

That the Board's Federal Register notices were specifically directed to the issue at hand, and that they stated the Board's considered views, are not seriously in question. Beginning in 2004, the Board addressed whether, as a matter of policy, it should require credit card issuers to provide notice to cardholders advising them when a default rate term is implemented. The consideration and adoption of such a disclosure obliga-

tion obviously begins with the question whether such a disclosure was already required by the existing change-in-terms requirements. The Board's Advance Notice of Proposed Rulemaking, issued in 2007, addressed this starting point. The Board stated that a new regulation would be necessary in order to require such a disclosure, because no notice was required under Regulation Z as it existed:

> [N]o change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice.

72 Fed. Reg. at 33,009.[6] Instead, as the Board continued, "under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs."

The Board was concerned, as a policy matter, however, that disclosure of the implementation of a default rate solely through billing statements should be supplemented, since billing statement disclosure was in-

---

[6] In parallel rulemaking under Regulation AA concerning unfair and deceptive practices, the Federal Reserve Board similarly stated: "Prior to the Regulation Z amendments published elsewhere ... no change-in-terms notice was required if the creditor set forth the specific change in the account-opening disclosures." 74 Fed. Reg. 5,498, 5,520-5,521 (Jan. 29, 2009).

herently retrospective in nature. *See* 72 Fed. Reg. at 32,957 (explaining that because under current rules "creditors need not inform consumers in advance if the rate applicable to their account increases due to default or delinquency," cardholders may not realize "until they receive their monthly statement for a billing cycle that their late payment triggered application of the higher default rate, effective the first day of the month's statement"); 74 Fed. Reg. 5,244, 5,253 (Jan. 29, 2009) (same). Ultimately, the Board did decide to adopt a new regulatory requirement, to apply prospectively, beginning with an effective date 18 months later in 2010, obligating card issuers to provide a new notice in advance of implementing default rates. 74 Fed. Reg. at 5253. Notably, the disclosure obligation is lodged in a new subsection—12 C.F.R. § 226.9(g)—because, as explained above, the implementation of a default rate does not come within the "change-in-terms" rule, *id.* § 226.9(c).[7]

---

[7] The Board's Federal Register statements in connection with the Credit CARD Act regulations following the Ninth Circuit's decision, reiterate the point. *E.g.*, 74 Fed. Reg. at 36,082-36,083 n.13 ("The distinction between these types of changes is that § 226.9(g) addresses changes in a rate being applied to a consumer's account consistent with the existing terms of the cardholder agreement, while § 226.9(c) addresses changes in the underlying terms of the agreement."); *id.* at 36,083 (noting that in the January 2009 amendments, the Federal Reserve had intended § 226.9(g) "to complement § 226.9(c)" by imposing parallel disclosure requirements concerning implementation of default rates pursuant to existing contract even though they did not involve "changes in the terms of the consumer's account agreement"); *id.* at 36,084 (emphasizing that "increases in applicable annual percentage rates due to application of existing provisions in the cardholder agreement" are covered by the new provision, § 226.9(g), while § 226.9(c) applies only to "changes in contract terms").

The panel majority's refusal to respect the Board's interpretation of its own regulatory requirements was wrong. An agency's ability to render authoritative interpretations of its own regulations is a necessary adjunct of its delegated authority to promulgate applicable regulations in the first instance. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("Because applying an agency regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." (citing *Mil-hollin*, 444 U.S. at 567-568)). Where an agency has interpreted its regulation, a court's responsibility is not to decide *de novo* "which among several competing interpretations best serves the regulatory purpose," but rather to defer to the agency's judgment unless it is plainly erroneous or inconsistent with the regulation. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). In TILA cases specifically, this Court has accorded weight to a proposed interpretation of Regulation Z and comments made by the Board in Federal Register preambles in interpreting statutory terms. *See Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205 (1981).

The panel majority did not identify any reason that could justify its refusal to respect the Board's interpretation of its own regulation. The panel majority did not contend that there was any regard in which the Board's interpretation was inconsistent with the regulation itself, such that it should be denied deference on "plain language" grounds. The opinion refers to the Board's statements as "tersely worded" (App. 13a, n.5), but that

characterization, if intended as a criticism, was misaimed. The Board's interpretive statements, as quoted above, were explicit; directly on point; covered the question at issue; and were more extensive, focused, and definitive, in addressing that issue, than the Official Staff Commentary itself. Nor did the Ninth Circuit have any reason to "suspect," despite an insinuation that it did (*see id.*), that the Board's (repeatedly) stated interpretation of § 226.9(c) failed to represent its "considered" views. *See Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). To the contrary, the Board's interpretations were issued as explanations, repeated over several years, in formal, notice-and-comment rulemaking preambles published in the Federal Register, and specifically advanced by the Board as a significant part of the required justification for its decision to adopt the new regulatory provision § 226.9(g).[8]

Finally there is nothing ambiguous about what the Board meant in its interpretation, when it said that under § 226.9(c) "no change in terms is required" when a card issuer raises the applicable rates based on default rate "agreements [that] permit the card issuer to increase the periodic rate if the cardholder makes a late payment." 72 Fed. Reg. at 33,009. The Board's words, and its reasoning that it would need to add new § 226.9(g) if it chose to impose a disclosure obligation

---

[8] Providing such an explanation was an official, appropriate and necessary aspect of its rulemaking. This Court previously has explained that when an agency is changing a previously announced rule, "the requirement that an agency provide reasoned explanation for its action ... ordinarily demand[s] that it display awareness that it is changing position .... And of course the agency must show that there are good reasons for the new policy." *FCC* v. *Fox Tel. Stations, Inc.*, 129 S. Ct. 1800, 1810-1811 (2009).

for implementation of a default rate, are, as Judge Cudahy's dissent put it, "more than clear." App. 26a (Cudahy, J., dissenting).[9] The panel majority's opinion cites a different passage from the same Federal Register notice, but it is neither inconsistent nor ambiguity-creating. *See* App. 10a-11a. The cited passage said that the Board was proposing to:

> Add § 226.9(g)(1) to require creditors to provide 45 days advance notice when a rate is increased due to a consumer's delinquency or default, or if a rate is increased as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit. This notice would be required even if, as is currently the case, the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures.

72 Fed. Reg. at 33,012. The panel opinion conceived that the phrase "currently the case" in this passage

---

[9] The panel majority opinion, referring to the Board's interpretation at 72 Fed. Reg. 33,009 (quoted in text above), says that "the term 'change-in-terms notice' could, as Chase argues, refer to contemporaneous notice required for changes in interest rates, but might instead refer only to the fifteen days' advance notice required for changes in contractual terms." App. 10a. It is difficult to understand this passage from the opinion, but the panel majority may have thought that § 226.9(c) established two different kinds of change-in-terms notices, and that the Board's interpretation applied only to a § 226.9(c) change-in-terms notice of the kind due 15 days in advance of a change in the cardholder agreement. In fact, § 226.9(c) only provides for one kind of change-in-terms notice, and the panel majority's statement makes no sense of either the regulation or the Board's interpretation of it.

could be a reference to disclosure requirements "currently the case" under § 226.9(c). But that is very plainly wrong: the passage is explicit that it is discussing proposed § 226.9(g), and the reference to what is "currently the case" is a reference to the card issuer practice of including a default rate provision in cardholder agreements and initial disclosures, *not* current regulatory requirements under § 226.9(c).

Whether or not the court of appeals agreed with the Board's pre-2009 policy choices, it was obligated to defer to them. *Milhollin*, 444 U.S. at 567-569. Its refusal to do so in *McCoy* seriously undermines the Board's role and creditors' ability to rely on the Board's pronouncements. Creditors depend on every piece of published guidance from the Board because, in order to lend, they must make the necessary disclosures, and in order to make those disclosures they must have "a coherent and predictable body of technical rules" on which to rely. *Id.* at 568-569 & n.10. It is the prerogative of the Board (and Congress) to change Regulation Z when policy judgments based on empirical investigations and other developments suggest that a different disclosure rule may provide more "meaningful disclosures" to consumers in order to effectuate the overall goals of TILA. *Id.* at 568-569. That is precisely what happened in the 2009 statutory and regulatory amendments. But it is not appropriate for the lower courts to mandate such changes by retrospectively interpreting the Regulation to conflict with the Board's own definitive interpretations. *See id.* at 568 ("[J]udges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.").

The Ninth Circuit's decision is not only palpably wrong as a matter of substance, and importantly in con-

flict with the Seventh Circuit; it also threatens the Board's authority and, as a result, the needed certainty of uniform administrative guidance under TILA. The decision should not be allowed to stand in light of this Court's clear directive that Board interpretations of Regulation Z should be dispositive unless demonstrably irrational. *Milhollin*, 444 U.S. at 566.

CONCLUSION

For the foregoing reasons, the petition should be granted and the Ninth Circuit decision reversed.

Respectfully submitted.

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
KELLY THOMPSON COCHRAN
MICHELLE OGNIBENE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

SEPTEMBER 2009

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES A. MCCOY, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

CHASE MANHATTAN BANK, USA, National Association,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
November 21, 2008—Pasadena, California
Filed March 16, 2009

No. 06-56278
D.C. No. CV-06-00107-JVS

OPINION

Before: RICHARD D. CUDAHY,* HARRY PREGERSON, and HAWKINS, Circuit Judges.

---

* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Opinion by Judge HAWKINS; Dissent by Judge CUDAHY.

HAWKINS, Circuit Judge:

This case presents the question of whether the notice requirements of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1615 and Regulation Z, 12 C.F.R. § 226, as interpreted by the Federal Reserve Board's Official Staff Commentary, apply to discretionary interest rate increases that occur because of consumer default. We hold that Regulation Z requires a creditor to provide contemporaneous notice of such rate increases.

FACTUAL AND PROCEDURAL BACKGROUND

James A. McCoy ("McCoy") brought this action on behalf of himself and others similarly situated against Chase Manhattan Bank, USA, N.A. ("Chase"), a national bank located in Delaware. McCoy alleges that Chase increased his interest rates retroactively to the beginning of his payment cycle after his account was closed to new transactions as a result of a late payment to Chase or another creditor. McCoy claims that the rate increase violated TILA and Delaware law because Chase gave no notice of the increase until the following periodic statement, after it had already taken effect. The district court dismissed McCoy's complaint with prejudice, holding that because Chase discloses the highest rate that could apply due to McCoy's default in its cardmember agreement with McCoy ("Cardmember Agreement"), no notice was required.

JURISDICTION AND STANDARD OF REVIEW

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and review dismissals for failure to state

a claim de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

DISCUSSION

Federal TILA Claim

Congress enacted TILA to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). Regulation Z, adopted by the Federal Reserve Board to implement TILA, addresses when and how notice of changes in terms must be given:

> Written notice required. Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.

12 C.F.R. § 226.9(c)(1). Section 226.6 requires that a creditor disclose *inter alia* "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.9(a)(2).

The parties dispute the meaning of the phrase "any term required to be disclosed under § 226.6." Chase

argues that the phrase applies only to the contractual terms of Chase's Card-member Agreement. McCoy suggests the phrase also applies to the list of specific "items" § 226.6(a)(2) requires be disclosed, which includes the interest rate that may be used.

Although we find McCoy's interpretation more natural, we acknowledge that the text of Regulation Z is ambiguous.

We defer to an agency interpretation of its own ambiguous regulation provided it is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). We do not "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

Chase argues that the Federal Reserve Board ("FRB")'s Official Staff Commentary interprets Regulation Z to require no notice in this case. We disagree.

Comment 3 is the most salient Official Staff Commentary to § 226.9(c)(1) and, when describing the amount of notice required for different kinds of changes, provides that "a notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change ... [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." § 226.9(c)(1), cmt. 3. The plain-meaning of Comment 3 is to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change. Under Comment 3, McCoy has stated a claim.

Chase argues that because Comment 3 repeats language from Regulation Z, a different portion of the Official Staff Commentary, Comment 1, should govern instead. Comment 3's specific reference to interest rate increases attributable to the consumer's delinquency or default is directly on point and therefore governs. Even if we decided that Comment 1, despite preceding Comment 3, could somehow be interpreted as an exception to it, we would still hold that Comment 1 does not dispel Chase's obligation to notify its account holders of discretionary rate increases.

Comment 1 to § 226.9(c)(1) describes the circumstances in which Regulation Z requires no notice of a change in terms:

> "Changes" initially disclosed. *No notice of a change in terms need be given if the specific change is set forth initially*, such as: Rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. In contrast, *notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase* (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate).

12 C.F.R. § 226.9(c), cmt. 1 (emphasis added).

The effect of Comment 1, assuming arguendo it applies, depends on how the phrase "specific" is defined. McCoy argues that the "specific change is set forth initially" and the "specific terms for an increase" are included in a contract when the contract gives consumers the information they need in order to know what interest rate they will be charged and under what conditions. Chase argues that any agreement that specifies the *possibility* of an interest rate increase if the cardholder defaults and establishes any boundaries on the potential amount of the increase adequately "sets forth" a "specific change."

McCoy's reading of Comment 1's use of the word "specific" is reinforced by the three examples Comment 1 includes of rate increases for which notice is *not* required. The first example is "rate increases under a properly disclosed variable-rate plan." *Id.* Variable rate plans specify that the interest rate will fluctuate in direct correspondence with an externally determined variable rate such as, for example, the Federal Prime rate. Providing additional notice of the interest rate charged under a variable rate plan would be redundant because variations in the interest rate are not discretionary, and the method for computing the interest rate based on the Federal Prime rate is fully specified in advance. Creditors in that circumstance need not provide additional notice because consumers can predict their precise interest rate according to a formula.

The second example in Comment 1 is "a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment." *Id.* Again, the notice of such a rate increase would be redundant because it "occurs" whenever the employee terminates employment. Nothing suggests the creditor possesses any discretion over whether to

increase the rates or by how much to do so once the event triggering a higher rate occurs.

The third example is "an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Id.* Again, the use of the word "occurs" rather than the phrase "may occur" suggests that additional notice would be redundant because the increase is non-discretionary.[10] All three examples pertain to rate increases that are spelled out in cardmember agreements and ascertainable by the consumer without additional notice.

In contrast to these examples, the increase here occurs at Chase's discretion and the most pertinent "specific terms for an increase"-the actual amount of the increase and whether it will occur-are not disclosed in advance. The Cardmember Agreement states that Chase "may" change McCoy's interest rate and impose a non-preferred rate "up to" the maximum rate described in the pricing schedule. The agreement further states that McCoy's account "may" lose its preferred rates if he defaults. Although the agreement defines what constitutes a "default" triggering Chase's ability to exercise this discretion, a default is only one of the conditions required for an increase; it may be neces-

[10] Although the dissent argues for an alternative view of these examples, we do not believe it is reading too much into the Board's description of "an increase that occurs" when specified criteria are met to conclude that the phrase refers to automatic increases. By declining to read the word "may" into the Board's language, we choose the more natural reading of the examples, if not the only conceivable one.

sary, but apparently it is not sufficient. Chase outlines several other criteria it "may" obtain and use to review McCoy's account "for the purposes of determining its eligibility for Preferred rates," including McCoy's consumer credit reports, his payment history and level of utilization over the life of his account, and his other relationships with Chase and its affiliates.

Chase does not disclose to McCoy how it may use this information and provides McCoy with no basis for predicting in advance what retroactive interest rate Chase will choose to charge him if he defaults. Under the agreement, when McCoy defaults, he will not know whether his rate will stay the same, increase slightly, or rise to the maximum default rate until he receives his next periodic statement listing the new rate. Worse yet, this new rate would then apply retroactively.

Chase argues that the terms for an increase are adequately specified because the concept of a "default" is defined and because consumers are aware of the maximum rate they might pay in the "worst case scenario." It further argues that the discretionary increase that may occur when a consumer defaults can be reconceptualized as an automatic increase, followed by a discretionary reduction in rates. The district court accepted this line of reasoning, concluding that a "decision not to increase a rate is analytically indistinct from a decision to lower a rate."

This argument proves too much because it would apply equally to Comment 1's example of when contemporaneous notice *is* required. Comment 1 specifically explains that notice must be given "when an increase may occur under the creditor's contract reservation right to increase the periodic rate." 12 C.F.R. § 226.9(c), cmt. 1. Like a "reservation right to increase

the periodic rate," the contract provision authorizing Chase to increase a defaulted consumer's interest rate up to the maximum default rate at its discretion does not give the cardholder sufficient information to know what rate will apply and therefore requires the creditor to provide notice. Chase's "contract allows the creditor to increase the rate at its discretion," § 226.9(c), cmt. 1, and does not specify the relevant terms, including the conditions that are necessary and sufficient for an increase to occur and the actual amount of the increase that will occur. Chase's agreement not to increase the interest rate higher than a preset, double-digit maximum does not materially distinguish its Cardmember Agreement from a contract reservation right to increase the periodic rate. An interpretation of Comment 1 as eliminating Regulation Z's notice requirement even where consumers do not have sufficient information to determine whether their interest rate will be raised, or by how much, dilutes the meaning of the word "specific" beyond recognition.

Chase argues that we must nevertheless interpret Regulation Z to require no notice in this case because we must defer to a now-superceded Advance Notice of Proposed Rule-making,[11] promulgated for public comment by the Federal Reserve in 2007, which briefly characterizes existing law in the process of explaining a proposal to amend Regulation Z to increase the amount of notice for interest rate increases to forty-five days in

---

[11] This 2007 ANPR has been superceded by a final rule amending Regulation Z to require forty-five days' notice for rate increases effective July 1, 2010. Truth in Lending, 74 Fed. Reg. 5244 (Jan. 29, 2009) (to be codified at 12 C.F.R. § 226.9(g)(1)).

most cases. Truth in Lending, 72 Fed. Reg. 32948-01, 33009 (proposed June 14, 2007) ("2007 ANPR").

Consideration of the 2007 ANPR does not lead us to change our interpretation of the FRB's Official Staff Commentary. Chase observes that the 2007 ANPR includes as an example of when a "change-in-terms notice" is not required, "some credit card account agreements [that] permit the card issuer to increase the periodic rate if the consumer makes a late payment," noting that "[b]ecause the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs." 72 Fed. Reg. 33009. The effect of this language is ambiguous, however, because the term "change-in-terms notice" could, as Chase argues, refer to contemporaneous notice required for changes in interest rates, but might instead refer only to the fifteen days' advance notice required for changes in contractual terms.[12]

The 2007 ANPR also contains language suggesting it "is currently the case" that notice *is* required even if "the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-

---

[12] A slightly less terse, but substantively identical, provision in a 2004 ANPR suggests that the latter is more likely, stating that where the circumstances of an increase are specified in advance, "the creditor need not provide a change-in-terms notice *15 days in advance* of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs." Truth in Lending, 69 Fed. Reg. 70925-01, 70931-32 (proposed Dec. 8, 2004) (emphasis added).

opening disclosures." 72 Fed. Reg. 33012. The FRB reaffirmed this view in the "Supplementary Information" published by the FRB along with the final rule amending Regulation Z. In any case, FRB chose to remove the ambiguous language entirely when it issued a Final Rule and Supplementary Information amending Regulation Z in 2009. Truth in Lending, 74 Fed. Reg. 5244, 5350-03 (Jan. 29, 2009). Both the older ANPR and the recently approved statement of the FRB's views clearly state it "is currently the case" under Comments 1 and 3 that contemporaneous notice of default-based rate increases is required even where the "creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures." *Id.*

Therefore, while language scattered throughout the 2007 ANPR offers some support for each view of the Official Commentary, the ANPR does not clearly weigh in favor of either interpretation of Regulation Z. This ambiguity is not surprising because the primary purpose of the 2007 ANPR (and the 2004 ANPR that preceded it) was to announce proposed amendments to Regulation Z and solicit comment, not to offer additional staff commentary on Regulation Z's current requirements.

As the dissent notes, although no binding authority has addressed this question,[13] several district court

---

[13] This case is not governed by *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114 (9th Cir. 2009), which interpreted 12 C.F.R. § 226.6(a) to allow a promotional interest rate to be discontinued due to a late payment made prior to undertaking a balance transfer agreement. The plaintiff in *Hauk* did not appear to allege that the interest rate increase violated TILA because it was a discretionary interest rate increase undertaken without contempora-

opinions and one unpublished memorandum disposition in this circuit have accepted Chase's view. *See, e.g.*, *Evans v. Chase Bank USA, N.A.*, 267 Fed. Appx. 692, 693 (9th Cir. 2008) (unpublished disposition); *Swanson v. Bank of America*, 566 F. Supp. 2d 821 (N.D. Ill. 2008); *Williams v. Wash. Mut. Bank*, 2008 WL 115097, 2008 U.S. Dist. LEXIS 5325 (E.D. Cal. Jan. 10, 2008); *Shaner v. Chase Bank, USA, N.A.*, 570 F. Supp. 2d 195, 200 (D. Mass. 2008); *Evans v. Chase Manhattan Bank USA, N.A.*, 2006 U.S. Dist. LEXIS 5259 (N.D. Cal. Jan. 27, 2006). Most of these decisions cite the district court's analysis in *Evans*, which held that Chase set out the "specific terms for an increase" because "Chase gives the reasons for its rate changes." *Evans*, 2006 U.S. Dist. LEXIS 5259, at *7-8. In *Evans*, the district court apparently labored under the misconception that Comment 3 precedes Comment 1 and therefore did not apply where the conditions specified in Comment 1 are met. *See id.* at *6 (citing Comment 3 and then asserting that "[t]he Commentary goes on to state, however, that '[n]o notice of a change in terms need be given if the specific change is set forth initially,' ") (quoting Comment 1). Possibly for the same reason, most of these courts did not even discuss Comment 3 and none attended to the 2007 ANPR's internal ambiguities or considered what kind of deference, if any, is owed to an agency's characterizations of existing law when they

---

neous notice. Consequently, *Hauk* rested its holding on the irrelevance under TILA of a creditor's "undisclosed intent to act inconsistent with its disclosures," *id.* at 1122, and did not address whether § 226.9, as interpreted by Comment 1 or Comment 3, requires contemporaneous notice for such increases.

are incidental to the purpose of an agency publication.[14] Our own consideration of the FRB's Official Staff Commentary, unofficial ANPRs, and the Supplementary Information accompanying its recent amendment of Regulation Z leaves us firmly convinced of the FRB's

---

[14] The relevance of the 2007 ANPR was limited even before it was superceded because we defer to the FRB's Official Staff Commentary, not incidental descriptions of current law contained in an ANPR. The FRB has prescribed the Official Staff Commentary as "the vehicle by which the staff of the [FRB] issues official staff interpretations of Regulation Z." 12 C.F.R. Part 226, Supp. I, para. 1; *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980) (distinguishing the deference owed to Board and official staff interpretations from that owed to unofficial interpretations). Although Chase may, at a later stage of litigation, assert a statutory "good-faith" defense under 15 U.S.C. § 1640(f) for acting in conformity with an FRB interpretation promulgated "under such procedures as the Board may prescribe," the defense is only available for actions based on the Official Staff Commentary, not on such incidental interpretations appearing in an ANPR, particularly one that was promulgated after this suit was filed and could not have been relied upon when Chase acted.

Auer, 519 U.S. at 462, would not require any greater showing of deference. In *Auer*, the court deferred to an interpretation of a rule contained in an agency's legal brief that was directed specifically to the "matter in question." *Id.* at 462; *see also Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 213, 217 (1981) (characterizing a proposed ruling merely as "persuasive authority" not "wholly without significance," even though it was directly on the matter in question).

Here, the 2007 ANPR's tersely worded "interpretations" of existing law are incidental to the purpose of the agency action, are stated in conclusory fashion, are themselves ambiguous, and have now been superceded. Therefore, unlike in *Auer*, we do have "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. Consequently, we interpret the FRB's Official Staff Commentary directly.

intent to require contemporaneous notice when rates are raised because of a consumer's delinquency or default, as McCoy alleges occurred in this case.

State Law Claims

In his second, third, and fourth causes of action, McCoy claims that Chase's practice of retroactively raising interest rates after a consumer defaults is unconscionable and that he is therefore entitled to declaratory relief, reformation, and damages for imposing an illegal penalty. The district court correctly noted that these causes of action are foreclosed *if* Delaware law specifically authorizes the practice because, pursuant to the National Bank Act, 12 U.S.C. § 85, Delaware law governs what interest Chase may charge and the methodology used to determine that interest rate.

We reverse the dismissal of these claims, however, because the Delaware Banking Act authorizes rates of interest that "vary in accordance with a schedule or formula." 5 Del. C. § 944. As the district court noted, a permissible schedule or formula may include a provision for a change in the "rates of interest applicable to all or any part of outstanding unpaid indebtedness ... contingent upon the happening of any event or circumstance specified in the plan," including a default. *Id.* Section 944 therefore would clearly authorize a "schedule or formula" that specified a higher interest rate that would automatically apply in the event of default. However, the language of § 944 does not appear to authorize rate increases that are discretionary and vary according to criteria in addition to the consumer's default where those criteria are not specified in a schedule or formula contained in the agreement.

Absent binding Delaware court decisions construing the terms "schedule," "formula," or "contingent

upon" in § 944, our task is to "predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Arizona Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995) (quoting *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990)). In this case, however, only federal district courts have construed § 944 and not one has adequately addressed the importance of the discretionary nature of the increases or whether such increases are really "in accordance with a schedule or formula." *See, e.g., Swanson v. Bank of Am., N.A.*, 566 F. Supp. 2d 821, 829 (N.D. Ill. 2008) ("By describing the events which cause the rate increase to occur, Defendant has complied with Section 944."); *Evans v. Chase Manhattan Bank USA, N.A.*, 2006 U.S. Dist. LEXIS 5259, at *12 (N.D. Cal. Jan. 27, 2006) (concluding an agreement complied with § 944 because it described "what events will cause default rates to go into effect").

These interpretations of § 944 neglect to consider fully whether rate increases truly are "contingent upon" a default and in "accordance with a schedule or formula" where they are discretionary and can result in a range of interest rates depending on undisclosed criteria beyond the occurrence of a default. A close analysis of the Cardmember Agreement reveals that it does not describe the specific events that "*will* cause default rates to go into effect," *Evans*, 2006 U.S. Dist. LEXIS 5259, at *12 (emphasis added), but only those that *may* do so. It also fails to disclose how much Chase will actually increase rates should it choose to do so. As a result, we hold that the rate increases McCoy faced under the Cardmember Agreement were not authorized by § 944 because no "schedule or formula" contained in the

agreement revealed whether the increases would occur or how large they would actually be.

Having held that the contract provision authorizing discretionary interest rate increases is not authorized by § 944, we conclude that McCoy has made out a colorable claim that the provision may also be "unconscionable" under Delaware law and he should "be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making its determination." 6 Del. C. § 2-302; *see also Evans*, 2006 U.S. Dist. LEXIS 5259, at *12 (noting that absent authorization under § 944, "Plaintiffs' unconscionability contention may have had some weight").

Any increased interest charge stemming from a default that occurs retroactively functions as "damages paid in the event of a breach," not compensation for the increased risk of non-collection, because McCoy would still owe that retroactively imposed additional charge even if he paid Chase his entire balance the moment after he defaulted. For these reasons, we reverse the dismissal of McCoy's second, third, and fourth causes of action.

McCoy's fifth cause of action alleges Chase committed consumer fraud by failing to provide notice of an increase in interest. Delaware's consumer fraud statute, 6 Del. C. § 2513(a), prohibits:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person

> has in fact been misled, deceived or damaged thereby, is an unlawful practice.

This allegation fails to state a claim for consumer fraud under § 2513(a) because Chase openly and expressly notifies cardholders of the actions it reserves the right to take in the event of a default. Although Chase may have failed to fulfill its obligations under federal and Delaware law, McCoy has not alleged facts to support a finding that it concealed or misrepresented the possibility that it might raise rates without notice when a consumer defaulted. We affirm the dismissal of McCoy's fifth claim for relief.

McCoy's sixth and seventh causes of action allege claims for breach of contract and tortious breach of the implied covenant of good faith and fair dealing. The Cardmember Agreement states that Chase would "notify [McCoy] of any change if required by applicable law." Given the requirements under TILA and Delaware law discussed above, while McCoy clearly has stated a claim that Chase breached this explicit contractual provision,[15] he cannot state an implied duty of good faith claim because "where the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play." *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992). Conse-

---

[15] Chase's citation to the pre-existing legal duty doctrine is inapposite because a contractual promise to comply with preexisting federal legal obligation is enforceable, *Island Ins. Co. v. Hawaiian Foliage & Landscape, Inc.*, 288 F.3d 1161, 1167 (9th Cir. 2002), provided the contract is supported by independent consideration, *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 21 (Del. 2001).

quently, we reverse the dismissal of the sixth cause of action and affirm the dismissal of the seventh.

CONCLUSION

Under Regulation Z as interpreted by its Official Staff Commentary, McCoy has stated a TILA claim if Chase failed to give him notice of an interest rate increase "because of the consumer's delinquency or default" or if his contract with Chase "allows the creditor to increase the rate at its discretion but does not include the specific terms for an increase." 12 C.F.R. § 226.9(c)(1); *Id.*, cmt. 3; *Id.*, cmt. 1. Having concluded that McCoy has stated a claim under either standard, we reverse and remand to the district court. We affirm the dismissal of McCoy's fifth and seventh causes of action, but reverse the dismissal of McCoy's other state law claims.

AFFIRMED IN PART AND REVERSED IN PART. Costs on appeal to Appellant.

CUDAHY, Circuit Judge, dissenting:

Before addressing the myriad arguments made by the majority, I think it would be helpful to put matters in context—view the "big picture." The claims made by Mr. McCoy have been raised in many other forums, usually by the same attorneys who represent him here. *See Evans v. Chase Bank USA, N.A.*, 267 Fed. Appx. 692 (9th Cir. Feb. 22, 2008); *Swanson v. Bank of Am.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008); *Williams v. Wash. Mut. Bank*, 2008 WL 115097 (E.D. Cal. Jan. 11, 2008); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172 (E.D. Cal. 2007); *Penner v. Chase Bank USA, N.A.*, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006); *Evans v. Chase Manhattan Bank USA, N.A.*, 2006 WL 213740 (N.D. Cal. Jan. 27, 2006). In all of those cases the result was the opposite of the one reached here. In one case the court did at first indicate that it was inclined to rule in favor of the plaintiffs but reversed course when it was made aware of the Advance Notice of Proposed Rulemaking (ANPR) issued by the expert agency, the Federal Reserve Board (FRB or the Board), which quite clearly showed that the Board disagreed with their interpretation. *Shaner v. Chase Bank USA, N.A.*, 570 F. Supp. 2d 195, 199-200 (D. Mass. 2008) (citing 69 Fed. Reg. 70925-01, 70931-32 (Dec. 8, 2004)). The majority concedes, as it must given the unanimity of results on the other side, that the regulation is ambiguous. But the majority then departs from those holdings, and from established Supreme Court precedent, by refusing to defer to the Board's interpretation in the face of that ambiguity, and by suggesting, somewhat misleadingly, that the Board's interpretation is less than clear.

The provision of Regulation Z at issue here provides that "Whenever any term required to be dis-

closed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected." 12 C.F.R. § 226.9(c)(1) (emphasis added). This refers back to Section 226.6(a)(2), which says, "[t]he creditor shall disclose to the consumer ... each of the following items, to the extent applicable: ... each periodic rate that may be used to compute the finance charge ... and the corresponding annual percentage rate." 12 C.F.R. § 226.6(a)(2) (emphasis added). So the question becomes the following: did Section 226.9(c)(1) require Chase to provide contemporaneous notice to McCoy of an increase in his interest rate due to his default when that increase was an implementation of the existing terms of his agreement with Chase?[1] The majority says that although the re-

---

[1] The relevant portions of McCoy's Cardmember Agreement were the following:

CHANGE IN TERMS NOTICE

We are making certain changes to the terms of your Account as described below....

The following are changes to the existing terms of your Account.

> **Preferred Customer Pricing Eligibility**.... The section will be revised to read as follows:
>
> **Preferred Customer Pricing Eligibility**.... Your Ac-count will be reviewed every month on your Statement Closing Date to determine its continued eligibility for the Preferred or Non-Preferred rates. On each monthly review, we may change your interest rate and impose a Non-Preferred rate up to the maximum Non-Preferred rate described in the Pricing Schedule for each occurrence when you do not meet the conditions described below to be eligible for Preferred [rates]. Any changes in pricing as a result of the monthly reviews for Preferred or Non-Preferred rates will apply to existing as

gulation is ambiguous, the FRB's Official Staff Commentary to § 226.9(c)(1) makes the answer a clear "yes." The majority feels no need to give any deference to the Board's views expressed in its ANPRs, which lead to the opposite conclusion and which are reinforced by every other court that has considered the question. *See supra.*

The Supreme Court has instructed us to give respect and deference to the Board when interpreting the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"). *Ford Motor Credit Co. v. Milhollin*, 444 U.S.

---

well as new balances and will be effective with the billing cycle ending on the review date.

To keep Preferred rates, the following conditions must be met as of the review date:

- you have made at least the required minimum payments when due on your Account and on all other loans or accounts with us and your other creditors; and
- the credit limit on your Account has not been exceeded; and
- any payment on your Account has not been returned unpaid.

If you do not meet all of these conditions ... your Account may lose its Preferred rates....

We may obtain consumer reports from credit bu-reaus on you at any time in the future. We may use the reports and their contents, as well as information about your Account including its payment history and level of utilization over the life of your Account, and your other relationships with us and our affiliates to review your Account including for the purposes of determining its eligibility for Preferred rates and of establishing the Non-Preferred rate that may apply to your Account.

Appellant's Excerpts of Record, Tab 14, at Chase 00026.

555, 565-69 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive...."); *see also Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 212-13, 217 (1981). I would find that the Supreme Court requires deference to Board interpretations found in ANPRs. This required deference, of course, reflects universally applicable Supreme Court jurisprudence in keying statutory and regulatory interpretation on deference to the views of the responsible executive agencies. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

On December 19, 2008, as the majority notes, the Board issued a final rule amending Section 226.9 to require 45 days' notice for rate increases because of defaults, irrespective of whether the possibility of those increases was disclosed in a cardmember agreement. This new rule becomes effective in 2010. Truth in Lending, 74 Fed. Reg. 5244-01 (Jan. 29, 2009) (to be codified at 12 C.F.R. pt. 226). It comes after at least two ANPRs, 69 Fed. Reg. 70925-01, 70931-32 (Dec. 8, 2004); 72 Fed. Reg. 32948-01, 33009 (June 14, 2007), both of which recognized that requiring additional notice in these circumstances is a change from what is currently required. The 2007 ANPR explains:

> Advance notice is not required in all cases. For example, if an interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. See current § 226.9(c)(1); comment 9(c)(1)-3. Furthermore, no change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-

> 1. *For example, some account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice*; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs.

72 Fed. Reg. 33009 (emphasis added).[2]

The majority says that the relevance of the Board's statements is limited and we need not defer to them because they are not official comments, but merely "incidental descriptions of current law contained in an ANPR." Despite the majority's assertion to the contrary, its position conflicts starkly with that of the Supreme Court, which in *Anderson Bros. Ford* gave significant weight to a nearly identical publication. *See id.*, 452 U.S. at 212-13, 217 (calling a proposed official staff

---

[2] The distinction between "change-in-terms" notice and "advance notice" suggested by McCoy in his reply and by the majority is a weak attempt to escape the direct and explicit statements by the Board that contradict their position. Additionally, I disagree with the majority's interpretation of the Board's statement in its December 2008 "Supplementary Information" regarding what is "currently the case" as recognizing that contemporaneous notice is currently required by existing law. A near-verbatim statement appeared in the 2007 ANPR. 72 Fed. Reg. 33012. Elsewhere in that ANPR, as has already been discussed, the Board explicitly rejected the majority's view that Official Staff Commentary requires contemporaneous notice in a case like this one. I would not interpret a repetition of any portion of the 2007 ANPR as a sudden change of the Board's opinion.

interpretation "persuasive authority" and concluding that "we cannot agree that the staff's views expressed in the proposed ruling are wholly without significance"). In *Anderson Bros. Ford*, the Board published for comment an Official Staff Interpretation that was directly contrary to the view taken by three out of four courts of appeals. The Board said that while a "technical reading" of Regulation Z might support the three courts of appeals, it was the Board's opinion that the disclosure was not the type of thing "meant to be" required by Regulation Z (and was therefore not in fact required). *Id.* at 212-13. The Court said that the Board's interpretation did not conclusively establish the meaning of the words used in TILA, but that "absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation." *Id.* at 219. The Court strongly implied that this was so even if the text of the provision at issue suggested a contrary result, saying,

> Unaided by an administrative construction of the TILA and Regulation Z, a court could easily conclude, based on the language of the statute and of Regulation Z, that the interest in unearned insurance premiums acquired by the creditor in this case should be characterized as a "security interest" that must be disclosed. *But, in light of the proposed official staff interpretation of Regulation Z* [and the legislative history of TILA and related statutes], it is evident that the Board [disagrees].

Id. at 222 (emphasis added). The Court noted that it "has frequently relied on the principle that 'a thing may be within the letter of the statute and yet not within

the statute, because not within its spirit, nor within the intention of its makers.' " *Id.* at 222 n.20.[3]

An ANPR does not meaningfully differ from a "proposed official staff interpretation" for purposes of the deference we ought to accord it. The Supreme Court's decision in *Milhollin*, 444 U.S. 555, also supports this view. Although, as the majority points out, *Milhollin* distinguishes between "official" and "unofficial" staff interpretations in specifying which of the FRB's views may be relied on for a good-faith defense under 15 U.S.C. § 1640(f), *Milhollin*'s description of what makes an official interpretation "official" would apply equally to an ANPR: "[o]fficial interpretations are published in the Federal Register, and opportunity for public comment may be requested." *Milhollin*, 444 U.S. at 567 n.10. The same is true of ANPRs. *See* 72 Fed. Reg. 32948 ("The proposed revisions take into consideration comments from the public on an initial advance notice of proposed rulemaking (ANPR) published in December 2004 on a variety of issues relating to the format and content of open-end credit disclosures and the substantive protections provided under the regulation."). Moreover, the Court in *Milhollin* did not restrict itself to consideration of "official interpretations." It also considered FRB Public Information Let-

---

[3] *Cf. Milhollin*, 444 U.S. at 560 ("At the threshold ... interpretation of TILA and Regulation Z demands an examination of their express language; absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme. For the reasons following, we conclude that the issue [here] is not governed by clear expression in the statute or regulation, and that it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments.").

ters and CCH Consumer Credit Guides in divining the agency's views on the matter in question. *See Milhollin*, 444 U.S. at 563 & n.8. Nothing in *Milhollin* suggests that similar deference would not be appropriate here. To the contrary, *Milhollin* emphasized that the "traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in 'setting [the statutory] machinery in motion.'" 444 U.S. at 566 (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933)). In short, *Milhollin* encourages more deference, not less, to the Board's stated views.

The majority also marshals *Auer v. Robbins*, 519 U.S. 452 (1997) in support of its argument that ANPRs deserve no deference, but *Auer*, too, cuts the other way. *Auer* accords "controlling" deference to an agency interpretation found in a legal brief. 519 U.S. at 461, 462. Briefs drafted in litigation necessarily carry less weight than proposed rules subject to notice and comment, yet the *Auer* Court deferred because there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417-18 (1945) ("Any doubts concerning this interpretation of [the regulation] are removed by reference to the administrative construction of [the rule]," including in bulletins issued with the regulation, the Administrator's First Quarterly Report to Congress, and the Administrator's statement that this position had uniformly been taken "in countless explanations and interpretations" given to those affected by the regulation.).

It follows that, even if we somehow owe less deference to statements of the Board contained in an ANPR

than we would to an official comment, that does not mean we owe no deference at all, or less than controlling deference in the present case. *See United States Freightways Corp. v. C.I.R.*, 270 F.3d 1137, 1141 (7th Cir. 2001) ("[D]eference to agency positions is not an all-or-nothing proposition; more informal agency statements and positions receive a more flexible respect ..."). As a practical matter, the Board has made its opinion regarding the correct interpretation of its own regulation more than clear, and for the various reasons explained by the Supreme Court on many occasions, *see, e.g., Milhollin*, 444 U.S. at 565-69, we owe that opinion deference. Therefore, it is abundantly clear that the Supreme Court would not countenance disregard for the Board's opinion regarding the correct interpretation of Regulation Z, even if that opinion appears in an ANPR rather than Official Staff Commentary.

The majority, however, provides its own analysis based on its own interpretation of the FRB's Official Staff Commentary regarding Regulation Z, brushing aside the Board's views found in ANPRs. The potentially relevant comments are Comment 1 to Section 226.9(c) and Comment 3 to Section 226.9(c)(1):

> 9(c) Change in Terms
>
> 1. *Changes* initially disclosed. No notice of a change in terms need be given if the specific change is set forth initially, such as: Rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a

> particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate)....
>
> ...
>
> 9(c)(1) Written Notice Required
>
> 3. *Timing-advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change—in two circumstances:
>
> - If there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default....

12 C.F.R. § 226.9(c), cmt. 1; 12 C.F.R. § 226.9(c)(1), cmt. 3.

The majority concludes that "Comment 3's specific reference to interest rate increases attributable to the consumer's delinquency or default is directly on point and therefore governs." But these two comments are not a case of the specific versus the general or of one being an exception to the other. Instead, they are independent and each governs a distinct issue: Comment 1, whether a change-in-terms notice is required, and Comment 3, in cases where a change-in-terms notice is required, whether it must be issued 15 days in advance or not. Comment 3 does not purport to govern the

question whether notice is required. Neither does it specifically govern default situations.[4] Instead, it is entitled "Timing," and it specifically governs timing issues. In contrast, as the majority generally recognizes, "Comment 1 ... describes the circumstances in which Regulation Z requires no notice of a change in terms." *Accord Swanson*, 566 F. Supp. 2d at 827 ("Comment 3 applies only to the timing of a notice of 'change of terms.' As discussed above, Defendants' practice at issue here does not involve a 'change of terms' as contemplated by Section 226.9(c)(1).").[5] The majority does not recognize this distinction and therefore fails to account for the fact that, because Comment 3 assumes situations where notice is required and controls only timing, it does not address the question at issue here.

The majority says that even if Comment 1 applies, Chase did not satisfy its requirements and Comment 1 does not excuse Chase from providing contemporaneous notice of discretionary rate increases to account holders. The majority interprets Comment 1's use of the word "specific" ("No notice of a change in terms need be given if the *specific change* is set forth ini-

---

[4] In fact, the third example of Comment 1 is arguably a default situation: when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum.

[5] There are no doubt many instances where, unlike here, a creditor changes a consumer's interest rate upon his default and is required to provide a change-in-terms notice. There, Comment 3 would apply to determine the timing of the requisite change-in-terms notice. Here, however, we need not consider the issue of proper timing under Comment 3 because Chase is exempted from the requirement of additional notice by Comment 1.

tially.... [N]otice must be given if the contract allows the creditor to increase the rate at its discretion but does not include *specific terms* for an increase ...," 12 C.F.R. § 226.9(c), cmt. 1 (emphasis added)) to cover only circumstances in which the creditor has disclosed the exact change and the precise terms, so that additional notice would be redundant. I cannot interpret the comment so narrowly. It is certainly more than reasonable to find that Chase has satisfied it here.

In the Cardmember Agreement, Chase disclosed the three conditions that McCoy had to comply with in order to remain eligible for his Preferred rate. Violation of these conditions was necessary (even if not sufficient) for Chase to take away McCoy's Preferred rate. The Agreement disclosed the maximum interest rate that could apply: the maximum Non-Preferred rate described in the Pricing Schedule. It also disclosed the time at which the new rate would become effective: it would "apply to existing as well as new balances and [would] be effective with the billing cycle ending on the review date." Finally, Chase disclosed that it might take certain steps to investigate McCoy's compliance with the required conditions, including obtaining credit reports on him from consumer credit bureaus. Semantic contortions aside, I believe that these statements set forth a specific change and disclosed the specific terms for that change. *Accord Swanson*, 566 F. Supp. 2d at 825.[6] Chase's disclosure thus fulfills the obvious purposes of Comment 1.

---

[6] The fact that Chase did not disclose the precise factors it might use to determine not to exercise its discretion to impose the maximum increase should not offend Comment 1. The Board has indicated that contemporaneous notice is not required when a

The majority buttresses its conclusion to the contrary by reference to Comment 1's examples, saying that "[a]ll three examples pertain to rate increases that are spelled out in cardmember agreements and ascertainable by the consumer without additional notice." In contrast, it says, "the increase here occurs at Chase's discretion and the most pertinent' specific terms for an increase'—the actual amount of the increase and whether it will occur—are not disclosed in advance."

At the outset, the majority is wrong in assuming that the three examples do not involve any discretion on the creditor's part regarding whether to apply an increase and if so, how much of one. For instance, when analyzing the third example, the majority reads much into the Board's use of the phrase "an increase that occurs" instead of one that "may occur," concluding that the Board thereby meant that the increase would be automatic and non-discretionary. The Board does not specify in any of the examples that the increase must be of a definite amount that is ascertainable by the consumer without additional notice. This might be a valid assumption with regard to the first example (the vari-

---

creditor decides to reduce interest rates. *See* 12 C.F.R. § 226.9(c)(2). A creditor's decision to decline to impose the maximum increase has the same effect on a consumer as deciding to reduce interest rates, and a similar rationale would apply to justify the position that the creditor need not disclose in advance the exact circumstances in which it would decide not to impose the maximum increase. The majority says this argument proves too much because it would apply equally to an example in which Comment 1 specifically requires notice ("when an increase may occur under the creditor's contract reservation right to increase the periodic rate"). I disagree that this argument would apply equally to that example because in that example, there does not appear to be a specified maximum rate.

able-rate plan), but such ascertainability is not an essential element of the second and third examples. Neither states one way or the other whether they involve a precise and automatic increase.

Further, I am not persuaded, as the majority is, that the Board had in mind a standard of complete redundancy when specifying examples of situations where additional notice would not be required. To the contrary, the Board specifically recognized that there may be situations in which the creditor retains some discretion (as long as "specific ['terms[' for an increase" are disclosed, 12 C.F.R. § 226.9(c), cmt. 1) and additional notice is not required.[7] If discretion is sometimes permissible, then precise rates certainly may not always be ascertainable by the consumer before the fact.

As a final matter, I would just note that the interpretation of Regulation Z shared by Chase and the Board seems to me to be consistent with the purpose of TILA. *See Anderson Brothers*, 452 U.S. at 219-20 ("The purpose of the TILA is to promote the 'informed use of credit' by consumers.") (quoting 15 U.S.C. § 1601), 222 ("The Board's position is supported by the legislative history of both the TILA and the 1980 Act, and we hold that it is a permissible interpretation of the term 'security interest' as used in the TILA."); 15 U.S.C. § 1604 ("The Board shall prescribe regulations to carry out the purposes of this subchapter."). McCoy had all the information he needed in order to enjoy the informed use of his credit. He knew the conditions in

---

[7] For example, as here, where there is a warning of the range and potential extent of an increase.

which Chase could increase his interest rate and those conditions were under his control. He also knew the highest possible interest rate that could apply in the event of his default. I find it difficult to believe that McCoy, or any other cardmember, would have been better off had he known the precise formula that Chase uses to determine whether or how much to raise his interest rate. It seems extremely doubtful that in deciding whether to pay his bills on time, McCoy might have attempted to use that formula to determine what his chances were of keeping the same interest rate. Unlimited discretion to increase consumers' interest rates is something that TILA was intended to protect them against. I do not believe that discretion to decline to increase a consumer's rate all the way up to the permissible maximum, such as Chase had in this case, poses a similar danger. There is nothing irrational or oppressive in allowing a creditor a degree of discretion in dispensing mercy.

Because I would find that McCoy has not stated a claim for a violation of TILA, I would not reach his state law claims.

For all of these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CHASE MANHATTAN BANK, USA, National Association; and DOES 1 through 100, inclusive,

Defendants.

Case No. SACV-06-107 JVS (RNBx)
[Hon. James V. Selna]

[STAMP: LODGED: 2006 JUL 24 PM 2:25]
[STAMP: FILED AUG 11, 2006]
[STAMP: ENTERED AUG 14 2006]
[STAMP: THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)]

Date: August 14, 2006
Time: 1:30 p.m.
Dept.: 10C
Action Filed: March 23, 2004
Trial Date: None Set

~~[PROPOSED]~~ ORDER GRANTING DEFENDANT CHASE BANK USA, N.A.'S MOTION TO DISMISS

The motion of Defendant Chase Manhattan Bank USA, N.A. n/k/a Chase Bank USA, N.A. for an order

dismissing the Second Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6) came for hearing before this Court on August 14, 2006.

Having considered the briefs and oral argument of the parties, this Court finds that the First Amended Complaint fails to state a claim on which relief may be granted. Accordingly

IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss the Complaint is GRANTED. This action is DISMISSED WITH PREJUDICE.

Dated: 8.10, 2006

/s/ James V. Selna
Hon. James V. Selna
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. SACV-06-107 JVS (RNBx)

Date August 10, 2006

Title James A. McCoy v. Chase Manhattan Bank USA

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter

[STAMP: DOCKETED ON CM AUG 11 2006]

Attorneys Present for Plaintffs	Attorneys Present for Defendant
Not Present	Not Present

Proceedings: (In Chambers) **Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint. (Fld 7-24-06)**

III. BACKGROUND

Defendant Chase Manhattan Bank USA ("Chase") moves the Court to dismiss plaintiff James A. McCoy's ("McCoy") Second Amended Compliant [sic] ("SAC") pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the Court grants Chase's motion.

IV. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss will not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In resolving a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the Complaint. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

V. DISCUSSION

A. Allegations Contained the SAC

Chase is a national banking association organized under the National Bank Act, with its home in the State of Delaware. (SAC, ¶ 3). McCoy purports to represent all Chase credit card holders "whose interest rates were increased, without advance notice of such increase, after their accounts were closed to new transactions, where such increases were triggered on the basis of a 'default' that consisted of either a late payment to Chase, or a reported late payment to some other creditor." (*Id.*, ¶ 23.) McCoy's SAC alleges claims for: (1) violation of the Truth in Lending Act ("TILA"); (2) declaratory relief; (3) severance of unconscionable contract terms; (4) imposing and enforcing an illegal penalty; (5) consumer fraud; (6) breach of contract; (7) tortious breach of the implied covenant of good faith and fair dealing and consumer fraud. (SAC, p. 1.)

McCoy's SAC therefore challenges Chase's practice of raising a cardholder's interest rate after a delinquency with Chase or another creditor. As Chase contends, McCoy concedes that the Cardmember Agreement ("Agreement") specifically authorizes Chase to raise a cardholder's interest rate if the cardholder is delinquent with Chase or another creditor. (SAC, ¶ 16.) Further, Chase avers that this practice is expressly authorized by state and federal law. (Mot., p. 4.) The Court agrees with both of Chase's contentions.

McCoy further alleges that Chase does not provide notice of an increase in interest rates triggered by the cardholder's default with another creditor and that Chase applies the increase to the start of the billing cycle. (SAC, ¶¶ 5, 6, 19.) However, as Chase avers, the Agreement specifically provides notice of this practice, providing:

> Your account will be reviewed every month on your Statement Closing Date to determine continued eligibility for the Preferred or Non-Preferred rates. ... Any changes in your interest rates as a result of the monthly reviews for Preferred or Non-Preferred rates will be effective with the billing cycle ending on the review date.

(RJN, Ex. 4.)[23]

---

[23] McCoy alleges that "Chase's assertion that it provides advance notice of the 'specific terms' for a rate increase is demonstrable false ... [because] Chase's month-end determination whether or not to increase rates is based on a well hidden, entirely secret, and strictly confidential methodology that is never given to

McCoy additionally alleges that the interest rate charged by Chase upon default is unlawful, referring to the higher rates as "dramatic and overreaching," "illegal penalties," and "punitive." (SAC, ¶¶ 15, 22.) However, as Chase points out, McCoy does not allege that the higher rates is [sic] higher than the default rate authorized by his agreement or applicable usury laws. (Mot., p. 5.)

B. Prior Similar Cases

As Chase asserts, McCoy seeks to assert claims previously asserted by other plaintiffs which have previously been dismissed by Judge Cormac Carney and Judge Samuel Conti, with prejudice. (Mot., p. 1.) On March 23, 2005, McCoy's counsel filed a similar case against Chase in Orange County Superior Court, *Faith Dugan et al. v. Chase Manhattan Bank*, No.SACV 05-484 CJC (ANx) (C.D. Cal. July 20, 2005), alleging claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and consumer fraud. That case was subsequently removed. On July 26, 2005, Judge Carney granted Chase's motion to dismiss. (Request for Judicial Notice ("RJN"), Ex. 1.) McCoy's counsel filed an amended complaint, but voluntarily dismissed the action before any rulings were based on the amended complaint.

McCoy's counsel then filed a case against Chase in the Northern District of California, *Robyn Evans, et al. v. Chase Bank USA., N.A.*, No. C-05-3968 SC, 2006 WL 213740 (N.D. Cal., Jan. 2006). As Chase avers, other than two additional causes of action, the substitution of

---

its customers." (Opp'n, pp. 5-6; Decl. Haider Zaidi.) In light of the terms of the Agreement, the Court disagrees. (RJN, Ex. 4.)

new plaintiffs, and other minor changes, the *Evans* action was exactly the same as the amended complaint in *Dugan* which McCoy's counsel voluntarily dismissed from Judge Carney's court. On January 30, 2006, Judge Conti, of the Northern District of California, dismissed with prejudice all of the causes of action brought in *Evans*. *Evans v. Chase*, 2006 WL 213740 (N.D. Cal., Jan. 30, 2006).[24] In doing so, Judge Conti rejected the same causes of action which are asserted in this case.

McCoy argues in his Opposition that while "there is overlap between some of the issues in this case and those ruled on by Judge Conti, [McCoy] respectfully disagrees with the ruling of Judge Conti, and such ruling is currently under appeal." (Opp'n , p. 24.)

The Court agrees with Chase's characterization of the Evans action. The instant case and the Evans action contain the same seven causes of action, and the same allegations underlying those causes of action. Judge Conti has written an in-depth and well-reasoned opinion. At the very least, Judge Conti's opinion provides the Court with the significant guidance in its analysis.

C. First Claim: Violations of the Truth in Lending Act

McCoy avers that Chase violates Regulation Z of the TILA by "failing to notify its customers of increases in interest rates on or before the effective date of the change." (SAC, ¶ 26, citing 12 C.F.R.

---

[24] Chase informs the Court that Evans appealed Judge Conti's ruling and the case is currently being briefed before the Ninth Circuit.

§ 226.9(c)(1).) TILA requires written notice "[w]henever any term required to be disclosed under Sec. 26.6 is changed." 12 C.F.R. § 226.9(c)(1).

As Chase points out, McCoy does not point to any change in Chase's terms, but rather the increases complained of are the implementation of terms explicitly disclosed to McCoy. Chase points to a section of the Official Staff Commentary to Regulation Z ("Commentary"):

> No notice of a change in terms need be given if the specific change is set forth initial, such as: [r]ate increased under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminate employment, or an increase that occurs when the consumer has been under an agreement to maintain an certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase.

12 C.F.R. pt. 226, Supp. I, § 226.9(c)(1), cmt. 1.[25] As Chase avers, the last sentence does not provide any support for McCoy because Chase does "include specific terms for an increase" by identifying the maximum

---

[25] As Judge Conti noted, the Commentary, which is put forth by the Board of Governors of the Federal Reserve System is entitled to a great deal of deference. *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981)

possible rate and the specific acts that might resulted in such higher interest rate, such as a late payment to Chase or another creditor. (Mot., p. 6, n.4, *see* RJN, Ex. 4.)

Chase concludes that an increase in interest rates based on delinquency with another creditor and credit history is not a "change in terms" under TILA because Chase discloses in the Agreement that it may increase interest rates based on such a delinquency. (Mot., p. 6; *see* RJN, Ex. 4.) Judge Conti dismissed this identical cause of action for the same reason: "The Commentary ... states that creditors need not give notice if the specific change is set forth initially, such as in a variable rate plan. [Chase] gives cardmembers notice of these changes." *Evans v. Chase*, 2006 WL 213740 at *2.

As Chase notes, a change in terms occurs if the lender increases interest rates without any prior disclosure of the basis for the increase. For instance if the lender exercises its discretion to raise a cardmember's rate because of rising market rate, but does not initially disclose the specific circumstance under which an increase will occur. 12. C.F.R. pt. 26, Supp. I, § 226.9(c), cmt. 1. As Chase avers, because it discloses the basis on which it will increase interest rates due to default, and discloses the highest rate that could apply,[26] an in-

---

[26] Chase notes that, as stated in the Agreements, there may be circumstances in which Chase chooses not to increase the rate to the highest possible disclosed rate after a default. Chase avers that the fact that it does so does not require any additional disclosure. Section 26.9(c)(2) provides that "[n]o notice ... is required when the change involves ... a reduction of any component of a finance or other charge." 12 C.F.R. § 226.9(c)(2). A decision not to increase the interest the interest rate has the same effect as a reduction in the maximum interest rate from the higher, default rate

crease in the interest rate based on these specific circumstances is not a change in terms within the meaning of Regulation Z, and no additional notice to the cardmember is required. (Mot., p. 7.) Chase concludes that the TILA provisions and commentary quoted by McCoy in paragraphs 27 through 20 of the SAC are inapposite, because they concern the kind of written notice required after a change in terms. The Court agrees and dismisses McCoy's first claim.

D. Second, Third and Fourth Claims: Declaratory Relief, Severance of Terms, Illegal Penalty

McCoy contends that Chase's practice of increasing interest rates based on a delinquency is unconscionable, and therefore that he is entitled to declaratory relief, reformation and damages for imposing and enforcing an illegal penalty. (SAC, ¶¶ 35-46.)

Judge Conti dismissed identical causes of action brought by McCoy's counsel against Chase. *Evans*, 2006 WL 213740 at *3. Further, the Agreement identifies the actions by a borrower that authorize Chase to increase McCoy's interest rate to the Non-Preferred rate:

> Any promotional rate or regular preferred Pricing rate may change to your Non-Preferred/Default APR rate if any loan or ac-

---

to the lower, promotional rate. Chase avers that consistent with section 226.9(c)(2) this circumstance does not require a change in terms notice, so this discretion given to Chase in the agreements does not change the analysis. (Mot., p. 7, n.5.) The Court agrees. A decision not to increase a rate is analytically indistinct from a decision to lower a rate: in both cases the consumer benefits.

> count of yours with us *or your other creditors was past due*, your Account was overlimit, any payment on your Account was returned unpaid or if your Account was closed for any reason.

(SAC, ¶ 16; emphasis added by McCoy.) Chase argues here, as it did successfully before Judge Conti, that this provision, which permits Chase to raise a cardholder's interest rate after certain occurrences, is specifically authorized by the law of Chase's home state, Delaware. Pursuant to section 85 of the National Bank Act, 12 U.S.C. § 85, Delaware law governs the interest rate charged by Chase and the methodology used to determine that rate. Section 994 of the Delaware Banking Act provides:

> If the agreement governing the revolving credit plan so provides, the periodic percentage rate or rates of interest under such plan may vary in accordance with a schedule or formula.... Without limitation, a permissible schedule or formula hereunder may include provision in the agreement governing the plan for a change in the periodic percentage rate or rates of interest applicable to all or any part of outstanding unpaid indebtedness ... contingent upon the happening of any event or circumstances specified in the plan, which event or circumstance may include the failure of the borrower to perform in accordance with the terms of the plan.

5 Del. C. § 994. As Judge Conti noted, the "statute declares that a permissible formula or schedule can be based on the occurrence or non-occurrence of an event or circumstance described in the agreement, such as we see in the Cardmember Agreement." *Evans*, 2006 WL

213740 at *3. Judge Conti further noted, "[t]he Cardmember Agreement, by describing what events will cause default rates to go into effect, complies with these requirements." *Id.* Judge Conti therefore concluded, and this Court agrees, that the terms of the Agreement are not unconscionable, but rather the [sic] are specifically authorized by statute. *Id.* The Court therefore dismisses McCoy's second, third, and fourth claims for relief.

E. Fifth Claim: Consumer Fraud

McCoy also alleges that Chase committed consumer fraud by filing to provide notice of an increase in interest triggered by the cardholder's default with another creditor, and that Chase applies the increase to the start of the billing cycle. (SAC, ¶ 54-55.)

The specific statute, 6 Del. C. § 2513(a) (2005) prohibits:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact, with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

McCoy has failed to state a claim for consumer fraud. Chase expressly notifies cardmembers of the actions that it may take in the event of a default, rather than practicing concealment or making false promises. *See Evans*, 2006 WL 213740 at *5. McCoy's fifth claim for relief is dismissed.

F. Sixth Claim: Breach of Contract

McCoy claims that because the Agreement is governed by federal law it "incorporate[s] federal law" and hence "Chase is contractually bound to comply with federal law," making any violation thereof a breach of contract. (SAC, ¶ 66.)

As Judge Conti noted, based on identical claims, this claim is a reiteration of McCoy's first claim. *Evans*, 2006 WL 213740 at *4. The Agreement provides notice that Chase may vary a cardmember's rates. Regulation Z does not require any more notice from Chase. *Id.* As Judge Conti noted, "even if federal law applies, Chase has not, under the fact alleged, infracted it." *Id.* Therefore McCoy's fifth [sic] claim for relief is dismissed.

G. Seventh Claim: Brfeach of Covenant of Good Faith and Fair Dealing

McCoy alleges that by taking the alleged actions, Chase breached the implied covenant of good faith and fair dealing. However, as noted, Chase's actions are explicitly authorized by the Agreement. Hence McCoy's seventh claim for relief is dismissed.

VI. Conclusion

For the foregoing reasons, the Court dismisses McCoy's SAC with prejudice.

Pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, the Court deems the matter submitted without oral argument, and removes the August 14, 2006 hearing from its calendar.

Initials of Preparer /s/ [illegible]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES A. MCCOY, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

CHASE MANHATTAN BANK, USA, National Association,
Defendant-Appellee.

[STAMP: FILED JUN 16 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS]

No. 06-56278
D.C. No. CV-06-00107-JVS
Central District of California
Los Angeles

ORDER

Before: CUDAHY,* PREGERSON, and HAWKINS, Circuit Judges.

A majority of the panel has voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc.

---

* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are **DENIED**.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
NOV 30 2009
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioners,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BARRY L. KRAMER
12428 Promontory Road
Los Angeles, CA 90049
(310) 440-9761

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent

November 2009

QUESTION PRESENTED

Should this Court grant certiorari to review an interlocutory decision interpreting regulatory provisions under the Truth in Lending Act that were amended in 2009 to expressly require the consumer disclosures at issue in this case?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE WRIT 4

I. The question presented has no continuing importance because the regulation has been amended to expressly require the very disclosures at issue. 4

II. The interlocutory posture of the case and availability of a good-faith defense on remand underscore that review is unwarranted. 6

III. The court of appeals carefully reviewed the text of the pre-2009 regulation, the official staff commentary, and the 2007 advance notice of proposed rulemaking. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Auer v. Robbins,
519 U.S. 452 (1997) 2

Braxton v. United States,
500 U.S. 344 (1991) 4

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad,
389 U.S. 327 (1967) 6

Ford Motor Credit Company v. Milhollin,
444 U.S. 555 (1980) 4

Shaner v. Chase Bank USA,
--- F.3d ----, 2009 WL 4068703 (1st Cir. Nov. 25, 2009) 5

Swanson v. Bank of America,
563 F.3d 634 (7th Cir. 2009) 5

Swanson v. Bank of America,
559 F.3d 653 (7th Cir. 2009) 5

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 8

STATUTES AND REGULATIONS

Truth in Lending Act,
15 U.S.C. §§ 1601-1615 2

15 U.S.C. § 1640(f) 6, 7

Regulation Z
12 C.F.R. § 226.9 2
12 C.F.R. § 226.6(a)(2) 1
12 C.F.R. § 226.9(c)(1) 1
12 C.F.R. § 226.9(g) 1

74 Fed. Reg. 5244 (Jan. 29, 2009) 1

MISCELLANEOUS

Eugene Gressman, et al.,
Supreme Court Practice (9th ed. 2007) 6

STATEMENT

1. In January 2009, the Federal Reserve Board amended Regulation Z, which implements the Truth in Lending Act, to expressly require a credit-card issuer to provide a cardholder with advance notice of increases on the rate of the cardholder's account due to default. In this case, Chase Bank seeks review of a decision holding that such disclosures were required under the pre-2009 version of the regulation.

Two pre-amendment regulatory provisions were at issue in the decision below. The first, 12 C.F.R. § 226.6(a)(2), required a credit-card issuer to initially disclose to cardholders "each periodic rate that may be used to compute the finance charge." The second, 12 C.F.R. § 226.9(c)(1), provided that "[w]henever any term required to be disclosed under 226.6 is changed or the required minimum payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected," within 15 days of the change. The controversy between the parties in the proceedings below focused on whether, under the pre-2009 regulations, the phrase "any term required to be disclosed under § 226.6" encompassed only contractual terms of the cardholder agreement or the specific items listed in § 226.6, including "each periodic rate."

The 2009 amendment added a third provision, 12 C.F.R. § 226.9(g), that expressly requires advance notice in the event of a rate increase, regardless of whether the cardholder agreement authorizes a maximum default rate. *See* 74 Fed. Reg. 5244, 5414–15 (Jan. 29, 2009). That amendment eliminates any prospective significance of the question presented in this case.

2. Respondent James McCoy sued petitioner Chase Bank in 2006, alleging that Chase retroactively increased

the interest rate on his credit card at the beginning of his payment cycle after his account was closed to new transactions, as a result of a late payment to another creditor. Pet. App. 2a. McCoy alleged that because Chase gave him no advance notice of the rate increase, the increase violated the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1615, and Regulation Z, 12 C.F.R. § 226.9. He also alleged that the increase violated Delaware law. The district court dismissed McCoy's complaint, holding that because Chase's cardmember agreement disclosed the highest rate that could apply due to McCoy's default, no actual notice of the increase was required. Pet. App. 35a-47a.

The court of appeals reversed and remanded for further proceedings concerning McCoy's state and federal claims. *Id.* at 18a. As to the TILA claim, the court engaged in a detailed analysis of the relevant regulatory provisions and the Federal Reserve Board's Official Staff Commentary. The court began by observing that although McCoy's was the "more natural" reading of the regulation, the text of the pre-2009 regulation was ambiguous. *Id.* 4a. Emphasizing the principle that "an agency interpretation of its own ambiguous regulation" is entitled to deference, the court focused on the Board's Staff Commentary. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452 (1997)).

Specifically, the court rested its analysis on Comment 3 to section 226.9(c)(1), which provided that "a notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change . . . [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." *Id.* The court concluded that the "plain meaning" of this comment was "to require notice when a cardholder's interest rates increase because of a default, but

to specify that the notice may be contemporaneous, rather than fifteen days in advance." *Id.*

The court next rejected Chase's argument that a different portion of the Official Staff Commentary, Comment 1, should control. The court explained that "Comment 3's specific reference to interest rate increases attributable to the consumer's delinquency or default is directly on point and therefore governs." *Id.* 5a. In any event, the court concluded that Comment 1's more general statements did not alter the analysis. Comment 1 provided that "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate)." *Id.* Even if Comment 1 were applicable, the court concluded, notice would be required because "the increase here occurs at Chase's discretion and the most pertinent 'specific terms for an increase'—the actual amount of the increase and whether it will occur—are not disclosed in advance." *Id.* at 7a.

Finally, the court rejected Chase's contention that a different conclusion was required by statements characterizing existing law in the Board's then-superseded 2007 Advance Notice of Proposed Rulemaking, which sought public comment on the proposal ultimately adopted in January 2009. The court concluded that, although "language scattered throughout the 2007 ANPR offers some support for each view of the Official Commentary, the ANPR does not clearly weigh in favor of either interpretation of Regulation Z." *Id.* at 11a.

As to the state-law claims, the court of appeals held that McCoy had "made out a colorable claim" that Chase's retroactive rate increases were unconscionable

under Delaware law, which "does not appear to authorize rate increases that are discretionary and vary according to criteria in addition to the consumer's default where those criteria are not specified in a schedule or formula contained in the agreement." *Id.* at 14a, 16a.

Chase filed a petition for rehearing en banc. No judge of the court of appeals called for a vote, and the petition was denied. *Id.* 49a-50a.

REASONS FOR DENYING THE WRIT

I. The Question Presented Has No Continuing Importance Because the Regulation Has Been Amended To Expressly Require the Very Disclosures At Issue.

This Court does not normally grant certiorari to review assertedly erroneous interpretations of regulatory provisions. The ability of expert administrative agencies to decide when and how to amend their own regulations is reason alone for the Court to be "restrained and circumspect in using [its] certiorari power." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (declining to decide issue that could be decided by agency with authority to "periodically review the work of the courts" and "make whatever clarifying revisions conflicting judicial decisions might suggest"). That general approach is particularly suited to the Federal Reserve Board's intricate and highly technical regulations under the Truth in Lending Act—a statute in which Congress evinced "a decided preference for resolving interpretive issues by uniform administrative decision," rather than through the judiciary. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).

In this case, review is especially unwarranted because the agency has already acted. As Chase acknowledges (at 12), its petition asks this Court to interpret

regulations that the Federal Reserve Board amended in 2009 to expressly require the type of disclosures at issue here. Specifically, the Board added a new subsection, 12 C.F.R. § 226.9(g), that prevents retroactive changes and requires notice of higher interest rates 45 days in advance. 74 Fed. Reg. 5244, 5414–15 (Jan. 29, 2009). Thus, the Board has not only addressed the issue; it has rejected Chase's preferred rule on a prospective basis.

The Board's 2009 amendment resolves the question presented and eliminates any conflict among the courts going forward. Chase's petition seeks review primarily on the ground that the decision below conflicts with the Seventh Circuit's decision in *Swanson v. Bank of America*, 559 F.3d 653 (7th Cir. 2009); *accord Shaner v. Chase Bank USA*, --- F.3d ---, 2009 WL 4068703 (1st Cir. Nov. 25, 2009). But, as the Seventh Circuit explained in denying a petition for rehearing in that case, there is no continuing "conflict in need of resolution" because section 226.9(g) "clears up the ambiguity in the current regulation and commentary." *Swanson v. Bank of Am.*, 563 F.3d 634, 635 (7th Cir. 2009). Indeed, Chase concedes that the new regulation "requires advance notice when a card issuer is implementing an increased periodic rate pursuant to a default rate term," regardless of whether the original cardmember agreement specifies a maximum potential rate. Pet. 12. That concession demonstrates that the question presented has no continuing importance.

Undeterred, Chase maintains that the Court should grant review because the 2009 rulemaking "does not moot the legal question" concerning liability "under the prior regulation." *Id.* at 22. That observation holds true whenever an agency makes non-retroactive amendments to its regulations, but it hardly indicates that a question of regulatory interpretation—the sort of question this

Court generally does not review anyway—is sufficiently important to warrant certiorari. Moreover, as explained below, the prospect that any defendant will be held liable, even under the old rules, is far from certain. The decision below leaves open significant issues on remand, including whether Chase is completely exempt from liability as a result of good-faith reliance on administrative interpretations.

II. The Interlocutory Posture of the Case and Availability of a Good-Faith Defense on Remand Underscore That Review Is Unwarranted.

Apart from the fact that the regulation at issue has been amended to eliminate the prospective significance of the question presented, review is unwarranted because this case comes to the Court in an interlocutory posture. The court of appeals remanded this case for further proceedings on McCoy's claims. This Court ordinarily awaits the entry of final judgment before granting review, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), and there is no reason to depart from that settled practice here. *See* Gressman, *Supreme Court Practice* 280 (9th ed. 2007).

As the court of appeals correctly observed, "Chase may, at a later stage of litigation, assert a statutory 'good-faith' defense under 15 U.S.C. § 1640(f) for acting in conformity with an [official] FRB interpretation." Pet. App. 13a n.5. Under TILA's "good faith" defense, a creditor is completely immune from civil liability for acts "done or omitted in good faith in conformity with any rule, regulation, or interpretation" of TILA by the Board, or the interpretation of an authorized official of the Board, "notwithstanding that after such act or omis-

sion has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f). The defense thus exempts creditors from civil liability for the very sort of conduct that Chase presumably believes it engaged in here—conduct in good-faith reliance on a subsequently modified regulation or interpretation of the Board. In advancing its defense on remand, Chase may rely on any official Board interpretations. Chase may also cite a recent amicus filing by the Board concerning the question presented. *See Amicus* Br. of Bd. of Governors of the Fed. Reserve in Case No. 09-1157, *Shaner v. Chase Bank USA* (1st Cir.). If the district court or the court of appeals determines that Chase qualifies for the good-faith defense, Chase will face no federal civil liability.

In addition to remanding on McCoy's federal claim, the court of appeals also remanded for further proceedings concerning his state-law claims. Specifically, the court of appeals held that Chase's retroactive rate increases were not authorized by section 944 of the Delaware Banking Act because that section "does not appear to authorize rate increases that are discretionary and vary according to criteria in addition to the consumer's default where those criteria are not specified in a schedule or formula contained in the agreement." Pet. App. 14a. The court therefore concluded that McCoy stated a "colorable claim" implicating unsettled questions of Delaware law that must be addressed on remand. *Id.* at 16a. Chase does not, of course, seek review of this issue of state law. If McCoy prevails on his state-law claims, however, Chase will face liability in any event.

On remand, the district court will be free to find for Chase on any lawful ground, in which case review of the question presented would not be necessary (or appropri-

ate). Should Chase succeed in raising a good-faith defense, or defeat class certification, or prevail on the merits, the questions it now seeks to present will become academic. Should McCoy prevail on his state-law claims, the practical impact of the federal-law issues may also become academic. And should McCoy prevail on his TILA claims, Chase will be free to present the question presented to this Court following entry of a final judgment. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

III. The Court of Appeals Carefully Reviewed the Text of the Pre-2009 Regulation, the Official Staff Commentary, and the 2007 Advance Notice of Proposed Rulemaking.

Much of Chase's petition is devoted not to any significant issue of federal law, but to Chase's disagreement with the court of appeals' resolution of a narrow interpretative question concerning a now-superseded regulation. Pet. 23-34. That disagreement takes two forms, neither of which justifies this Court's review.

First, Chase contends that the court of appeals "ignored" the text of the pre-2009 regulatory provisions and accompanying Official Staff Commentary. Pet. 23-26. In fact, far from "ignor[ing]" them, the court engaged in an unusually detailed review of the text of those materials. The court concluded that a "natural reading" of the regulation favored McCoy, but that the regulations were ambiguous. Pet. App. 4a. Accordingly, the court turned to the Federal Reserve Board's Official Staff Commentary, emphasized that the Board's interpretation of its own regulations was entitled to deference, and concluded that Comment 3 to the relevant rule was directly on point and indicated that McCoy had stated a claim. Pet. App. 4a. But the court did not stop there; it also carefully exam-

ined Comment 1 to the regulation, on which Chase relied. It concluded that Comment 1 was not clearly applicable and that, even if it were, it would not alter the court's conclusion. Pet. App. 5a-8a. Chase does not claim that any of this analysis ran afoul of this Court's precedents or otherwise implicated any broader issues of federal law. Especially in light of the Federal Reserve Board's subsequent amendment to the regulation, this narrow dispute is unworthy of further review.

Second, Chase complains at length (Pet. 27-34) that the court below accorded insufficient weight to certain statements found in the Federal Reserve Board's 2007 Advance Notice of Proposed Rulemaking, which ultimately led to the 2009 amendments that resolved the question presented. Again, the court of appeals did not ignore the statements in the regulatory preamble. Rather, it concluded that "language scattered throughout" the ANPR provided "some support for each view of the Official Commentary," but did not "clearly weigh in favor of either interpretation of Regulation Z." Pet. App. 11a. Contrary to what Chase says (Pet. 30), the court never "refused" to follow the Board's statements in its preamble. Instead, it deferred to the portion of the Official Staff Commentary that it found directly on point (Comment 3) and concluded that the totality of other agency statements did not point in the opposite direction.

At bottom, despite its attempt to invoke settled rules of administrative deference (Pet. 30-31), Chase cannot identify any important principle of federal law at stake in this case. This narrow dispute, concerning the technical details of a superseded banking regulation, does not warrant review by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

BARRY L. KRAMER
12428 Promontory Road
Los Angeles, CA 90049
(310) 440-9761

Counsel for Respondents

November 2009

REPLY BRIEF

Supreme Court, U.S.
FILED
DEC 15 2009
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
MICHELLE OGNIBENE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. RESPONDENT'S ATTEMPTS TO AVOID REVIEW LACK MERIT 3

A. The Board's Prospective Amendment To Regulation Z Does Not Obviate The Need For Review 3

B. The Posture Of The Case Does Not Support Denial Of The Petition 5

II. RESPONDENT'S REFUSAL TO DEFEND THE MERITS OF THE NINTH CIRCUIT'S DECISION CONFIRMS THAT COURT'S ERROR 7

III. AT A MINIMUM, THE COURT SHOULD REMAND FOR RECONSIDERATION IN LIGHT OF THE VIEWS EXPRESSED IN THE BOARD'S AMICUS BRIEF IN *SHANER* 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Auer v. *Robbins*, 519 U.S. 452 (1997) 10, 11

Braxton v. *United States*, 500 U.S. 344 (1991) 4

Estelle v. *Gamble*, 429 U.S. 97 (1976) 5

Lawrence ex. rel. Lawrence v. *Chater*, 516 U.S. 163 (1996) 10, 11

Long Island Care at Home, Ltd. v. *Coke*, 546 U.S. 1147 (2006) 11

Mazurek v. *Armstrong*, 520 U.S. 968 (1997) 5, 6

Shaner v. *Chase Bank USA, N.A.*, ___ F.3d ___, 2009 WL 4068703 (1st Cir. Nov. 25, 2007) 2, 3, 11

Swanson v. *Bank of America, N.A.*, 563 F.3d 634 (7th Cir. 2009) 3

Swanson v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009) 3

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 6

STATUTES AND REGULATIONS

15 U.S.C. § 1640 6

12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)(1)-3 9

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Brief for the United States as Amicus Curiae, *Long Island Care at Home, Ltd.* v. *Coke*, No. 04-1315 (U.S. Dec. 22, 2005), *available at* 2005 WL 3533239 11

Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae at the Request of the Court, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. Oct. 22, 2009) 5, 9, 10

Gressman, Eugene, *et al.*, *Supreme Court Practice* (9th ed. 2007) 6

Petition for Rehearing *En Banc* for the Plaintiff-Appellant, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. Dec. 9, 2009) 3

Supreme Court Rule 10 8

IN THE

Supreme Court of the United States

No. 09-329

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

A divided panel of the Ninth Circuit held that Regulation Z, the Federal Reserve Board's regulation implementing the Truth-in-Lending Act (TILA), required petitioner Chase Bank USA to provide a "change-in-terms" notice before implementing a default-rate provision in respondent James McCoy's credit card agreement—even though that implementation involved no change in the contractual terms previously disclosed to respondent. This Court's review is warranted because the panel majority's holding is wrong, inconsistent with this Court's precedent regarding deference to agencies' interpretations of their own

regulations, and in conflict with the conclusion reached by every other court to address the issue, including the Seventh Circuit, a different panel of the Ninth Circuit (in an unpublished decision), and numerous district courts.

Since the petition was filed, the First Circuit has reached the same result as the Seventh, deepening the conflict and underscoring both the infirmity of the decision below and the continuing importance of the question presented. *See Shaner* v. *Chase Bank USA, N.A.*, ___ F.3d ___, 2009 WL 4068703 (1st Cir. Nov. 25, 2007). *Shaner* also highlights another development. The First Circuit's decision rested on an amicus brief filed by the Board at that court's invitation. In its brief, the Board unambiguously states that its view of its own regulation—one long held—is the interpretation that Chase and the rest of the credit card industry share, not the interpretation that the panel majority adopted below.[1]

Respondent offers no valid basis to deny certiorari. He does not dispute the circuit conflict, nor does he seek to defend the fundamental flaws in the Ninth Circuit's analysis. Indeed, he does not defend the merits of the decision at all—doubtless because the Board's amicus brief confirms that the Ninth Circuit's "firm[]" conviction "of the [Board's] intent" was wrong. Pet. App. 13a-14a. Respondent instead notes that the Board has prospectively amended Regulation Z and that the case has not proceeded to final judgment. Neither point, however, justifies denial of plenary review.

---

[1] The Board's brief is available through the First Circuit's online docket sheet for *Shaner* (*i.e.*, PACER) but not on LEXIS or Westlaw. Chase has therefore submitted a letter seeking permission to lodge the brief with this Court.

Even respondent's counsel recognizes the continuing importance of the question presented. Last week in *Shaner*, one of respondent's counsel urged the First Circuit to rehear that case *en banc* on the grounds that the Regulation Z question is one "of exceptional importance" on which an "irreconcilable circuit split" exists, involving a problem "national in scope," where the First Circuit's decision "will likely influence several other major lawsuits around the country." Pet. for Reh'g *En Banc* 1, 2, *Shaner*, No. 09-1157 (Dec. 9, 2009).

Those statements confirm the need for plenary review here. Even if such review were not warranted, the appropriate course would be to grant the petition, vacate the judgment below, and remand for further consideration in light of the Board's clear statement in its *Shaner* amicus brief of its longstanding position on the question presented.

I. RESPONDENT'S ATTEMPTS TO AVOID REVIEW LACK MERIT

A. The Board's Prospective Amendment To Regulation Z Does Not Obviate The Need For Review

Chase's first argument for certiorari (Pet. 18-23) is that the Ninth Circuit's decision conflicts with the Seventh Circuit's holding in *Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied with op.*, 563 F.3d 634 (7th Cir. 2009). That conflict has deepened: Last month the First Circuit rejected the Ninth Circuit's conclusion and sided with the Seventh Circuit (and every other judge to consider the issue save the two in the majority below). *See Shaner*, 2009 WL 4068703.

Respondent nevertheless urges the Court to ignore this irreconcilable division based on the erroneous contention (Opp. 4) that "[t]his Court does not normally grant certiorari to review assertedly erroneous interpretations of regulatory provisions." The decision respondent cites for this proposition, *Braxton* v. *United States*, 500 U.S. 344 (1991), actually says the opposite: There the Court observed that although "Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations," this Court "[o]rdinarily ... regard[s] the task as initially and primarily ours." *Id.* at 347-348. The Court departed from that ordinary practice in *Braxton* only because the relevant statute suggested that it "may not be Congress' intent *with respect to the Sentencing Guidelines*," *id.* at 348 (emphasis added), and because "the specific controversy before us can be decided on other grounds," *id.* at 349. Here, there is no parallel to the legislative charge to the Sentencing Commission, nor can the Ninth Circuit's decision about Regulation Z be reversed on another ground.

Respondent also wrongly contends (Opp. 5) that the Board's 2009 amendment to Regulation Z "resolves the question presented and eliminates any conflict among the courts going forward." The 2009 regulation applies only to transactions after its effective date, so it does nothing to eliminate the existing circuit split regarding the meaning of the pre-amendment Regulation Z. Until that conflict is resolved, the lower courts will continue to expend limited resources addressing these cases, just as the *Shaner* court had to do.

The Board's 2009 amendment also does not remove the threat of substantial liability under the Ninth Circuit's decision. As explained in the petition and the in-

dustry amicus brief, the practice that the Ninth Circuit condemned under Regulation Z was not an isolated one; it was the industry standard. *See* Pet. 5-6 & n.1, 11-12; Amicus Br. of Am. Bankers Ass'n *et al.* 2, 8. And the prospect of suits seeking such liability is not merely hypothetical. As a result of the decision below, similar putative class actions have been filed against a wide swath of the credit card industry. *See* Pet. 22 & n.4. The liability question also raises fundamental questions of fairness, owing to the Ninth Circuit's refusal to follow established principles of deference. The industry unfairly faces potential class-action TILA liability because it followed and complied with the Board's own longstanding construction of its regulation. *See* Pet. 20; Amicus Br. of Am. Bankers Ass'n *et al.* 4; Board Amicus Br. 5, 15, *Shaner* (Oct. 22, 2009).

Ultimately, as the First Circuit stated in inviting the Board to file an amicus brief in *Shaner*, the question presented "is a recurring one of considerable practical importance in law suits that have been and may yet be brought, even though a new prospective amendment to Regulation Z may resolve such problems as to future transactions." Order of Court 1-2, *Shaner* (Aug. 4, 2009). That statement describes a quintessential candidate for review by this Court.

B. The Posture Of The Case Does Not Support Denial Of The Petition

Respondent next asserts (Opp. 6-7) that review is unwarranted because the Ninth Circuit remanded the case for further proceedings. But this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (citing *Estelle* v. *Gamble*, 429 U.S. 97, 98 (1976),

and *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)). Review of such judgments is appropriate if the question would otherwise warrant review and "the Court of Appeals' decision is clearly erroneous," *Mazurek*, 520 U.S. at 975, or "is fundamental to the further conduct of the case," *General Motors*, 323 U.S. at 377; *accord* Gressman, *et al.*, *Supreme Court Practice*, § 4.18, at 281 (9th ed. 2007) (citing cases involving review by the Court of non-final judgments).

All of these standards are met here. Review is warranted for the reasons described above and in the petition, including the continuing circuit conflict and the fact that the Ninth Circuit's decision creates substantial problems for the industry as a whole. *See supra* pp. 3-5. Respondent does not defend the merits of the Ninth Circuit's interpretation of Regulation Z, and the Board's amicus brief in *Shaner* makes clear that the panel majority's decision is wrong. *See infra* pp. 7-10. Finally, because the facts regarding the timing of Chase's disclosure of respondent's increased rate are undisputed and the Ninth Circuit's decision construes Regulation Z for purposes of remand, absent this Court's review, the decision will fundamentally affect future proceedings in the case.[2]

Respondent contends (Opp. 6-7) that review is unnecessary because Chase might avoid liability on remand by invoking TILA's good-faith defense, 15 U.S.C. § 1640(f). The very passage of the Ninth Circuit's decision that respondent cites, however, undermines his

---

[2] Respondent suggests to the contrary by asserting (Opp. 7)that "Chase [may] face liability in any event" on state-law claims, but that is no basis for declining review of the Regulation Z issue, which implicates liability predicated on a different theory.

point. In footnote 5, the panel majority stated that "the defense is only available for actions based on the Official Staff Commentary"—which the court ultimately construed as rejecting Chase's interpretation—and "not on such incidental interpretations appearing in an" Advanced Notice of Proposed Rulemaking (ANPR). Pet. App. 13a n.14.[3] The court also stated that the defense would be unavailable for reliance on interpretations issued after Chase acted, *see id.*, which would include the Board's *Shaner* brief that respondent says (Opp. 7) Chase might invoke on remand. The Ninth Circuit's treatment of the good-faith defense thus provides no basis for denying review. If anything, that treatment makes review of the underlying Regulation Z issue all the more important.

II. Respondent's Refusal To Defend The Merits Of The Ninth Circuit's Decision Confirms That Court's Error

Review is also warranted because the Ninth Circuit's decision is wrong on the merits—both in its conclusion (Pet. 23-26) and in its refusal to defer to the Board's interpretation of its regulation (Pet. 27-34). Respondent's answer is unusual: He twice recounts what the Ninth Circuit's analysis was (Opp. 2-3, 8-9), but does not defend its result.

Respondent instead advances two points unrelated to the merits, but both are irrelevant. First, he states (Opp. 8-9) that the panel majority considered the regulation, Official Staff Commentary, and 2007 ANPR and hence did not literally "ignore" them. That is true, but

---

[3] Footnote 14 in the Petition Appendix is footnote 5 of the official version of the Ninth Circuit's opinion.

it does not validate the substance of the court's analysis or its conclusion, which are the subjects of Chase's challenges here. Second, respondent says (Opp. 9) that "Chase does not claim that [the Ninth Circuit's] analysis ran afoul of this Court's precedents." That is also true, as this Court has not previously considered the "change-in-terms" provision of Regulation Z, but the argument provides no reason to deny review. Chase seeks certiorari based on the entrenched conflict in the circuits and the error of the Ninth Circuit's decision. *See, e.g.*, S. Ct. R. 10.

Respondent similarly offers only a brief and misdirected answer to Chase's "length[y]" discussion (Opp. 9) of the Ninth Circuit's failure to defer to the Board's interpretation of its regulation. Here again respondent recounts what the court of appeals did, but does not address Chase's arguments. There can be no question, based on the panel majority's own explicit statements, that it refused to defer to what it termed the Board's "tersely worded," "incidental," and "conclusory" interpretations of Regulation Z. Pet. App. 13a n.14; *see* Pet. 27, 30-31. And even a cursory examination of the Ninth Circuit's opinion betrays the extent to which the panel majority strove to avoid the result to which appropriate deference should have led. *See* Pet. 31-33 & n.9. As previously explained, these aspects of the Ninth Circuit's decision have deleterious implications that go well beyond this case. *See* Pet. 33; Amicus Br. of Am. Bankers Ass'n *et al.* 9-18.

Respondent's choice to forego any defense of the merits of the Ninth Circuit's decision leaves Chase's challenges unrebutted, so Chase will not burden the Court by repeating those points. It is worth noting, however, that since the petition was filed, the Board has confirmed in unambiguous terms that, contrary to

the Ninth Circuit's decision, it interprets the pre-amendment version of Regulation Z—and has long interpreted it—precisely the same as Chase.

In response to an invitation from the First Circuit, the Board filed an amicus brief in *Shaner* explaining its views on the question presented here:

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Board Amicus Br. 1. The Board also observed that it has "consistently interpreted" Regulation Z in this way, *id.* at 5, adding that the recent amendments to Regulation Z confirm that consistency, *see id.* at 8-12. Finally, the Board specifically rejected several points at the heart of the Ninth Circuit's analysis. For example, the brief explains that Comment 9(c)(1)-3 of the Official Staff Commentary, *see* 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)(1)-3, is irrelevant because that comment concerns only the timing of required notices, not

whether notice is required in the first instance. *See* Board Amicus Br. 13-14; *compare* Pet. App. 5a ("Comment 3[] ... governs."). If there were any doubt that the decision below is wrong, the Board's amicus brief dispels it.[4]

III. At a Minimum, The Court Should Remand For Reconsideration In Light Of The Views Expressed In The Board's Amicus Brief In *Shaner*

Although plenary review is warranted for the reasons stated above and in the petition, at a minimum the Court should "GVR"—grant the petition, vacate the judgment below, and remand the case for reconsideration in light of the Board's amicus brief in *Shaner*. A GVR is appropriate "[w]here intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

That standard is met here. The panel majority viewed the relevant portions of Regulation Z as ambiguous and acknowledged that courts must "defer to an agency interpretation of its own ambiguous regulation provided it is not 'plainly erroneous or inconsistent with the regulation.'" Pet. App. 4a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court specifically recognized that deference would be due "to an in-

---

[4] As Chase noted (Pet. 21 n.2), its rehearing petition urged the Ninth Circuit to invite the views of the Board. The court did not do so.

terpretation of a rule contained in an agency's legal brief that was directed specifically to the 'matter in question.'" Pet. App. 13a n.14 (quoting *Auer*, 519 U.S. at 462). The Board's amicus brief provides just such an interpretation, it does so in a clear manner, and it is entitled to deference. Like the agency brief to which this Court deferred in *Auer*, the Board's views were expressed "in an *amicus* brief filed at the request of the Court" and not "advanced ... to defend past agency action against attack." *Auer*, 519 U.S. at 461, 462. The First Circuit deferred to the brief for just these reasons. *Shaner*, 2009 WL 4068703, at *4-5. There is accordingly more than a "reasonable probability" that the amicus brief would lead the Ninth Circuit to a different conclusion on remand and that "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167.

This Court's precedent confirms that a GVR would at minimum be appropriate. For example, in *Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006), the Court granted, vacated, and remanded for reconsideration in light of an advisory memorandum that was issued by the Department of Labor after the court of appeals decision in the case. As explained by the United States in its amicus brief in *Coke*, that memorandum undermined the basis for the lower court's decision by making clear that the agency always had held a certain interpretation of its own regulation, an interpretation entitled to great deference. *See* U.S. Amicus Brief 7-8, 9-10, 17-19, *Long Island Care at Home*, No. 04-1315 (U.S. Dec. 22, 2005), *available at* 2005 WL 3533239. The same is true of the Board's amicus brief in *Shaner*. If plenary review is not granted here, a GVR is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, NY 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
MICHELLE OGNIBENE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

DECEMBER 2009

AMICUS CURIAE BRIEF

FILED
MAY 19 2010
OFFICE OF THE CLERK

No. 09-329

In the Supreme Court of the United States

CHASE BANK USA, N.A., PETITIONER

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
MICHAEL S. RAAB
MATTHEW M. COLLETTE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

SCOTT G. ALVAREZ
General Counsel
RICHARD M. ASHTON
Deputy General Counsel
KATHERINE H. WHEATLEY
Associate General Counsel
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

QUESTION PRESENTED

The Federal Reserve Board's Regulation Z, 12 C.F.R. Pt. 226 (2008), amended by 74 Fed. Reg. 36,077 (2009), implements the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* Because the events that gave rise to this suit occurred before Regulation Z was amended in 2009, this case is governed by the pre-amendment version of the regulation. The question presented is as follows:

Whether, at the time of the events at issue in this case, Regulation Z required a credit card issuer to provide a change-in-terms notice before increasing the periodic interest rate on a credit card account pursuant to a default-rate term that had previously been disclosed in the cardholder agreement governing the account.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 10
A. The court of appeals erred in holding that Regulation Z required petitioner to provide a change-in-terms notice before implementing a contractual default-rate provision 11
B. The courts of appeals are divided on the question presented 17
C. Further consideration is warranted in light of the Board's recent authoritative interpretation of its regulations 19
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Anderson Bros. Ford v. *Valencia*, 452 U.S. 205 (1981) .. 16
Auer v. *Robbins*, 519 U.S. 452 (1997) 7, 10, 18, 19, 21
Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S.Ct. 856 (2009) 18
Lawrence v. *Chater*, 516 U.S. 163 (1996) 20
Long Island Care at Home, Ltd. v. *Coke*, 546 U.S. 1147 (2006) 20
Shaner v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009) ..... *passim*
Swanson v. *Bank of Am., N.A.*, 559 F.3d 653 (7th Cir. 2009) 17

Statutes and regulation: Page

Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 6
§ 101(a)(1), 123 Stat. 1735 6
§ 101(a)(2), 123 Stat. 1735 6
Truth in Lending Act, 15 U.S.C. 1601 *et seq.* 1
15 U.S.C. 1601(a) 1
15 U.S.C. 1604(a) 2
15 U.S.C. 1640(f) 2, 20
12 C.F.R.:
Pt. 226
Section 226.6(a)(2) 2, 11
Section 226.7 2
Section 226.9 ..... 2, 11, 12, 13
Section 226.9(c) 5, 11
Section 226.9(c)(1) 2, 14, 16
Section 226.9(g) 5
Supp. I, Official Staff Interpretations:
cmt. 9(c)-1 ..... *passim*
cmt. 9(c)(1)-3 ..... 3, 7, 9, 13, 14, 15

Miscellaneous:

69 Fed. Reg. (2004):
pp. 70,931-70,932 ..... 4, 12
p. 70,932 ..... 5, 12
72 Fed. Reg. (2007):
p. 32,948 5
p. 33,009 ..... 5, 16, 17

Miscellaneous—Continued: Page

p. 33,012 ..... 5, 13
p. 33,058 5
74 Fed. Reg. (2009)
p. 5244 ..... 5, 6, 13
p. 5254 ..... 5, 13
p. 5413 5
p. 5414 6
p. 36,077 6
pp. 36,095-36,096 6

In the Supreme Court of the United States

No. 09-329

CHASE BANK USA, N.A., PETITIONER

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the Federal Reserve Board's authoritative interpretation of the relevant regulations.

STATEMENT

1. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. 1601(a). The statute confers broad authority

on the Board of Governors of the Federal Reserve System (Board) to issue regulations to carry out the Act. See 15 U.S.C. 1604(a). Creditors that act in good-faith reliance on a rule, regulation, or interpretation by the Board or its staff are protected from civil liability under TILA. 15 U.S.C. 1640(f).

The Board's Regulation Z, adopted pursuant to Section 1604(a), requires credit card issuers to disclose certain information to consumers. At the time of the transactions at issue in this case, Regulation Z required credit card issuers to provide an "initial disclosure statement" specifying, *inter alia*, "each periodic rate that may be used to compute the finance charge." 12 C.F.R. 226.6(a)(2).[1] The regulation also required credit card issuers to provide a "periodic statement" notifying the consumer of the rates imposed during the previous billing cycle. 12 C.F.R. 226.7. Finally, the regulation imposed certain "subsequent disclosure requirements," 12 C.F.R. 226.9, including a requirement to provide notice "[w]henever any term required to be disclosed under § 226.6 is changed," 12 C.F.R. 226.9(c)(1).

Some credit card agreements state the interest rate that will be used to calculate the account holder's finance charge, while further providing that the rate may be increased up to a particular amount upon the occurrence of specified contingencies, such as the account holder's failure to make timely payments. The question presented in this case is whether, under the pre-2009 version of Regulation Z, credit card issuers were required to give advance notice before effecting rate

---

[1] As detailed pp. 5-6 & n.2, *infra*, in 2009, the Board amended Regulation Z's provisions relating to disclosure of changes in credit card finance charges, and Congress amended the TILA to address the same subject.

changes pursuant to such pre-existing contract terms. The Board's Official Staff Commentary to the pre-2009 change-in-terms provision explained that the notice requirement did not apply "if the specific change is set forth initially, such as * * * an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary). On the other hand, the commentary explained, "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase." *Ibid.*

Regulation Z generally mandated that any required change-in-terms notice be provided 15 days in advance of the effective date of the change. 12 C.F.R. 226.9(c)(1). But when an interest rate increase resulted from the consumer's delinquency or default, the regulation permitted creditors to increase the rate with less than 15 days' notice, as long as notice was provided "before the effective date of the change." *Ibid.* The Official Staff Commentary explained:

> *Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change * * * [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

Official Staff Commentary, cmt. 9(c)(1)-3.

2. In 2004, the Board began an initial inquiry into whether to amend the disclosure requirements govern-

ing the implementation of contractual default-rate provisions. The Board explained:

> Under Regulation Z, some changes to the terms of an open-end plan require additional notice. * * * However, advance notice is not required in all cases. For example, if the interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. 226.9(c)(1); comment 9(c)(1)-3. And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if [the] card issuer learns the consumer paid late on another credit account, even if the consumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 69 Fed. Reg. 70,931-70,932 (2004) (advance notice of proposed rulemaking). Noting that "[c]onsumer advocates have expressed concerns that consumers who have triggered certain penalty rates may not be aware of the possibility of the increase, and thus are unable to shop for alternative financing before the increased rate takes effect," the Board asked for comment on whether these "existing disclosure rules" are "adequate to enable consumers to make timely deci-

sions about how to manage their accounts." *Id.* at 70,932.

In 2007, the Board published proposed amendments to Regulation Z and to the Official Staff Commentary. *Truth in Lending*, 72 Fed. Reg. 32,948 (proposed rule). Describing Regulation Z in its then-current form, *id.* at 33,009, the Board proposed an amendment that would require 45 days' advance written notice when "(i) A rate is increased due to the consumer's delinquency or default; or (ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 33,058. The Board explained that "[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract." *Id.* at 33,012.

In 2009, the Board promulgated a final rule implementing the proposed changes. *Truth in Lending*, 74 Fed. Reg. 5244, 5254 (final rule). The Board amended Section 226.9(c) to require 45 days' prior notice of contractual changes, including changes in the terms governing computation of finance charges. *Id.* at 5413. The Board also adopted new Section 226.9(g), which requires 45 days' advance notice of increases in rates due to delinquency, default, or as a penalty, including penalties for "events specified in the account agreement, such as

making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 5414.[2]

3. In March 2004, respondent filed suit on behalf of himself and others similarly situated. Respondent alleged, *inter alia*, that petitioner had violated TILA by raising the interest rates of members of the putative class, without providing advance notice of the increases, after class members made late payments to petitioner or another creditor. Pet. App. 2a, 35a, 38a.

The district court granted petitioner's motion to dismiss. Pet. App. 37a-47a. The court noted that petitioner's Cardmember Agreement "specifically authorizes [petitioner] to raise a cardholder's interest rate if the cardholder is delinquent with [petitioner] or another creditor." *Id.* at 39a. Citing the Official Staff Commentary to Regulation Z, Comment 9(c)-1, the court concluded that petitioner had not violated TILA or Regulation Z by failing to provide advance notice of the rate increase. The court explained that, "because [petitioner] discloses the basis on which it will increase interest rates due to default, and discloses the highest rate that could apply, an increase in the interest rate based on these specific circumstances is not a change in terms within the meaning of Regulation Z, and no additional

---

[2] The 2009 amendments were scheduled to become effective on July 1, 2010. 74 Fed. Reg. at 5244. In May 2009, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), Pub. L. No. 111-24, 123 Stat. 1734. *Inter alia*, the Credit CARD Act amended TILA to require 45 days' advance notice of increases in annual percentage rates on credit card plans. § 101(a)(1), 123 Stat. 1735. That provision became effective on August 20, 2009. § 101(a)(2), 123 Stat. 1736. In response, the Board determined that the 2009 amendments to Regulation Z at issue in this case would likewise become effective on August 20, 2009. See 74 Fed. Reg. at 36,077, 36,095-36,096 (interim final rule).

notice to the cardmember is required." Pet. App. 43a-44a (footnote omitted).

4. The court of appeals reversed and remanded. Pet. App. 1a-33a.[3] The court "acknowledge[d] that the text of Regulation Z is ambiguous" with respect to the question presented here, and it recognized that a reviewing court must "defer to an agency interpretation of its own ambiguous regulation provided it is not 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 4a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court of appeals rejected petitioner's contention that the Board's "Official Staff Commentary interprets Regulation Z to require no notice in this case." *Ibid.* The court concluded that the "most salient Official Staff Commentary" was Comment 9(c)(1)-3, which the court read "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." *Ibid.*

The court of appeals further concluded that Comment 9(c)-1, which provides that "[n]o notice of a change in terms need be given if the specific change is set forth initially," did not "dispel [petitioner's] obligation" under Comment 9(c)(1)-3 "to notify its account holders of discretionary rate increases." Pet. App. 5a (emphasis and citation omitted). The court assumed arguendo that Comment 9(c)-1 applied to interest-rate changes. *Id.* at 6a. The court concluded, however, that petitioner's

---

[3] The court of appeals issued its decision on March 16, 2009, see Pet. App. 1a—*i.e.*, after the 2009 amendments to Regulation Z had been published in the *Federal Register* but before those amendments took effect. Because the transactions at issue here occurred before the amendments' effective date, it is undisputed that this case is governed by the pre-2009 version of the rule.

Cardmember Agreement had not set forth a "specific" change within the meaning of the provision, since the Agreement did not state precisely what rate would apply in the event of a default, but instead permitted petitioner to increase the rate up to a stated maximum. *Id.* at 6a-9a.

Petitioner also contended that the 2007 notice of the Board's proposed rule, which described the Board's understanding of the regulatory regime in effect before the 2009 amendments, supported petitioner's interpretation of Regulation Z in its pre-amendment form. Pet. App. 9a. The court of appeals rejected that argument. The court found the 2007 proposed rule and accompanying explanation to be "ambiguous" as to whether notice was required under the circumstances of this case. *Id.* at 10a-11a. The court also stated that the 2007 notice of the Board's proposed rule would be of limited relevance in any event because the court would "defer to the [Board's] Official Staff Commentary, not incidental descriptions of current law contained in an [advance notice of proposed rulemaking]." *Id.* at 13a n.14. The court of appeals concluded that the various explanatory materials issued by the agency left the court "firmly convinced of the [Board's] intent to require contemporaneous notice when rates are raised because of a consumer's delinquency or default, as [respondent] alleges occurred in this case." *Id.* at 13a-14a.

Judge Cudahy dissented. Pet. App. 19a-33a. In his view, the court of appeals should have deferred to the Board's explanation, expressed in both the 2004 advance notice of proposed rulemaking and the 2007 notice of the Board's proposed rule, that "requiring additional notice" before implementing contractual default-rate terms "is a change from" the requirements imposed by Regulation

Z in its pre-amendment form. *Id.* at 22a. Judge Cudahy also found the court's reliance on Comment 9(c)(1)-3 to be misplaced. *Id.* at 28a-29a. He expressed the understanding that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but instead "specifically governs timing issues." *Id.* at 29a. Judge Cudahy would instead have held that, under Comment 9(c)-1, no notice was required under the circumstances presented here because the Cardmember Agreement had set forth the "*specific change*" at issue. *Ibid.* (quoting Official Staff Commentary, cmt. 9(c)-1); see *id.* at 29a-32a.

5. After the court of appeals issued its decision in this case, the First Circuit confronted the same question as is presented here. See *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (2009). In order to ascertain the Board's understanding of Regulation Z in its pre-2009 form, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board submitted an amicus brief addressing the question. See *id.* at 491. That amicus brief explained:

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency

> occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Federal Reserve Board Br. at 1, *Shaner*, *supra* (No. 09-1157) (filed Oct. 22, 2009).

Consistent with the interpretation advanced in the Board's amicus brief, the First Circuit in *Shaner* held that the credit card issuer in that case was not required to provide advance notice before raising card holders' interest rates pursuant to a provision of the member agreement that authorized such increases upon the occurrence of a late payment. 587 F.3d at 492-493. The First Circuit explained that the Board's brief "was solicited [by the court] to supply the Board's view of its own regulations and as such it is entitled to due respect as the agency's 'fair and considered judgment on the matter in question.'" *Id.* at 493 (quoting *Auer*, 519 U.S. at 462). The First Circuit found Regulation Z in its pre-amendment form to be "less than crystal clear on the issue before" the court. *Ibid.* Based on the agency's authoritative interpretation as set forth in the Board's amicus brief, the court concluded that the card issuer's "position must prevail for the transactions in [*Shaner*], which took place prior to August 2009 when the statutory changes and the revised regulations took effect." *Ibid.*; see note 2, *supra* (discussing statutory and regulatory effective-date provisions).

DISCUSSION

At the time of the transactions at issue in this case, Regulation Z did not require credit card issuers to provide cardholders with a change-of-terms notice before implementing a default-rate provision contained in the pre-existing credit card account agreements. The court

of appeals' decision is inconsistent with the Board's longstanding interpretation of its own pre-2009 regulations, and it conflicts with the decisions of other courts of appeals. Although the court below recognized that the Board's interpretation of its own regulation was entitled to substantial deference, the court misunderstood the agency's position. In particular, the court of appeals misconstrued the pertinent provisions of the Official Staff Commentary. Moreover, the court did not have the benefit of the authoritative agency interpretation that the Board subsequently provided to the First Circuit at that court's request. This Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case to the court of appeals for further consideration in light of the amicus brief filed by the Board in *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009).

A. The Court Of Appeals Erred In Holding That Regulation Z Required Petitioner To Provide A Change-In-Terms Notice Before Implementing A Contractual Default-Rate Provision

1. At the time of the transactions at issue in this case, Regulation Z required that a creditor provide notice before changing any contractual term that must be disclosed in an initial disclosure statement. 12 C.F.R. 226.9(c). That notice requirement applied to changes in the cardholder's periodic interest rate. 12 C.F.R. 226.6(a)(2). As the Official Staff Commentary addressing Section 226.9 explained, however, "[n]o notice of a change in terms need be given if the specific change is set forth initially." Official Staff Commentary, cmt. 9(c)-1. The commentary provided as an example "a rate increase that occurs * * * when the consumer has been

under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Ibid.* The same rule applied when a cardholder agreement authorized the issuer to increase a consumer's interest rate if the consumer failed to make timely payments to his creditors. If a cardholder who had agreed to that contractual term made a late payment, any resulting rate increase did not represent a "change in terms," but rather the implementation of terms already set forth in the initial disclosure statement.

In 2009, the Board amended Section 226.9 to require credit card issuers to give 45 days' advance notice before implementing a contractual default-rate term. Both before and after that regulatory amendment took effect, however, the Board has repeatedly confirmed its understanding that Regulation Z in its pre-amendment form imposed no similar requirement. In its 2004 advance notice of proposed rulemaking, the Board stated that "no change-in-terms notice is required" for a rate increase pursuant to an agreement that "permit[s] the card issuer to increase the interest rate if the consumer pays late." 69 Fed. Reg. at 70,931-70,932. The Board explained that, "[u]nder Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Id.* at 70,932. When it proposed changing the rule in 2007, the Board explained that its "proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate applica-

tion of penalty pricing upon the occurrence of certain events specified in the contract." 72 Fed. Reg. at 33,012.

When the Board ultimately amended Section 226.9 in 2009, the Board described the amendment as a "Major Change[]" to the existing rule. 74 Fed. Reg. at 5244. The Board further explained that, "[e]ven though the final rule contain[s] provisions intended to improve disclosure of penalty pricing at account opening, the Board believes that consumers will be more likely to notice and be motivated to act if they receive a specific notice alerting them of an imminent rate increase, rather than a general disclosure stating the circumstances when a rate might increase." *Id.* at 5254. And in October 2009, after the amendment to Regulation Z had taken effect, the Board confirmed its understanding that the pre-amendment version of the rule had not required a change-in-terms notice under the circumstances presented here. In response to the First Circuit's request for clarification of the Board's view on that question, the Board submitted an amicus brief explaining that, under the pre-amendment rule, a credit card issuer could implement a default-rate provision contained in the account agreement without providing advance notice of the increase. See pp. 9-10, *supra*; pp. 17-21, *infra*.

2. In reaching its contrary conclusion, the court of appeals erred in at least three respects.

a. The court of appeals misinterpreted Comment 9(c)(1)-3 of the Official Staff Commentary. Comment 9(c)(1)-3 stated that "a notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change," in the event "there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." See Pet. App. 4a-5a (quoting Official Staff Commentary,

cmt. 9(c)(1)-3). The court of appeals construed Comment 9(c)(1)-3 "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." *Id.* at 4a. The court viewed Comment 9(c)(1)-3 as applicable even when, as in this case, a cardholder's interest rate is increased pursuant to a pre-existing term of the cardholder agreement that authorizes such a change upon the occurrence of specified contingencies. See *id.* at 5a.

Properly understood, however, Comment 9(c)(1)-3 addressed situations in which a card issuer increased a consumer's finance charge, based on the cardholder's delinquency or default, even though no provision of the pre-existing cardholder agreement authorized such an increase. Comment 9(c)(1)-3 also applied if the cardholder agreement authorized the issuer to raise a delinquent or defaulting consumer's interest rate up to a specified maximum, and the issuer responded to a cardholder's delinquency or default by raising the rate to a level *above* that maximum. In those circumstances, Section 226.9(c)(1) required notice of the rate increase because that increase effected a change in the cardholder agreement rather than the implementation of its existing terms.

Rather than establishing a freestanding disclosure requirement, Comment 9(c)(1)-3 specified the time at which such disclosures must be made—*i.e.*, "as late as the effective date of the change" rather than the usual 15 days in advance. Comment 9(c)(1)-3's status as a timing requirement was made clear by its heading ("*Timing—advance notice not required*") and location (under the general heading "9(c)(1) Written Notice Required"). Comment 9(c)(1)-3 did not create substantive

disclosure requirements where Regulation Z itself and Comment 9(c)-1 did not demand them. See Pet. App. 28a-29a (Cudahy, J., dissenting) (explaining that Comment 9(c)(1) 3 "does not purport to govern the question whether notice is required," but rather "assumes situations where notice is required and controls only timing"); *Shaner*, 587 F.3d at 492 (explaining that "comment 3 merely describes *when* notice must be given where it is otherwise required, whereas comment 1 explains *whether* changes specified in advance constitute changes in terms necessitating notice").

b. The court of appeals also concluded that Comment 9(c)-1 was inapplicable because petitioner's Cardmember Agreement was insufficiently "specific"— that is, because it gave petitioner discretion to determine whether, and to what extent, it would increase a defaulting consumer's interest rate up to a specified maximum. See Pet. App. 7a-8a. That analysis is mistaken.

When a cardholder agreement identifies a contingency that triggers a rate increase, and the maximum possible rate that the issuer may charge if that contingency occurs, the agreement does not lack the requisite specificity merely because it allows the issuer to exercise discretion in the consumer's favor. If a provision of a cardholder agreement that mandated a particular increased rate under specified circumstances could be implemented without notice to the consumer, there is no reason to require such notice when a particular agreement authorizes the issuer to choose whether and by how much to increase the rate in the event of delinquency or default. Under either type of cardholder agreement, Regulation Z in its pre-amendment form did not require notice of a rate increase because the in-

crease reflected an *implementation* of the parties' existing contract rather than a change in its terms.

c. Finally, the court of appeals erred in disregarding the Board's 2004 advance notice of proposed rulemaking and 2007 notice of the Board's proposed rule, which contained detailed explanations of the change-in-terms requirements in Section 226.9(c)(1) and accompanying commentary. The court dismissed the Board's statements in those documents as purely "incidental descriptions of current law." Pet. App. 13a n.14. In fact, the 2004 and 2007 descriptions of then-current law were authoritative summaries of the Board's interpretation of the existing change-in-terms requirements, published in the *Federal Register*, and provided to explain the Board's proposal to change the very rule it was describing. As such, they warranted the court's deference. See, *e.g.*, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981) (deferring to a proposed official staff interpretation of Regulation Z published in the *Federal Register*, and noting that, "absent some obvious repugnance to the statute, the Board's regulation ' ' ' should be accepted by the courts, as should the Board's interpretation of its own regulation").

The court of appeals (Pet. App. 10a-11a) also misread the 2004 and 2007 notices, finding ambiguity in their descriptions of then-existing law where no ambiguity existed. In particular, the court misread the 2007 notice's statement that "the creditor currently need not provide a change-in-terms notice" before implementing a contractual default-rate provision. *Id.* at 10a (quoting 72 Fed. Reg. at 33,009). Hypothesizing that "the term 'change-in-terms notice'" might "refer only to the fifteen days' advance notice required for changes in contractual terms," the court suggested that language was consis-

tent with a rule requiring issuers to give *contemporaneous* notice of a rate increase. *Ibid.* The court's approach reflects an unnaturally circumscribed understanding of the phrase "change-in-terms notice," even if that phrase is considered in isolation. And as the court itself recognized, the relevant sentence of the 2007 notice went on to state that, under Regulation Z in its pre-amendment form, "the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Ibid.* (quoting 72 Fed. Reg. at 33,009). That statement makes clear that the Board did not construe its pre-amendment regulation to require even contemporaneous notice when an interest rate is increased pursuant to a contractual default-rate provision.

B. The Courts Of Appeals Are Divided On The Question Presented

1. The court of appeals' decision in this case conflicts with the decisions of the two other courts of appeals that have considered the issue.

a. Like the respondent in this case, the plaintiff in *Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), contended that the issuer of her credit card was required to provide separate notice before implementing a default-rate provision contained in the pre-existing cardholder agreement. See *id.* at 655. The court of appeals rejected that argument. See *id.* at 655-657. The court explained that "there is no good reason to override * * * a contract that unambiguously authorizes" a rate increase in the event of a default, *id.* at 656, and that it was bound to "honor the Board's commentary on its rules" by "taking the Board at its word" that the 2009 amendments "make[] a real change," *id.* at 657.

b. In *Shaner*, *supra*, the First Circuit confronted the same question and found Regulation Z in its pre-amendment form to be "less than crystal clear on the issue." 587 F.3d at 493. In light of the conflict between the Ninth Circuit's decision in this case and the Seventh Circuit's ruling in *Swanson*, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board submitted an amicus brief addressing the question presented here. *Id.* at 491; see pp. 9-10, *supra*. That brief stated "the Board's position that, at the time of the transactions at issue in [*Shaner*], Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default." *Shaner*, 587 F.3d at 493. The First Circuit recognized that the interpretation of Regulation Z set forth in the Board's amicus brief was "entitled to due respect as the agency's 'fair and considered judgment on the matter in question,'" *ibid.* (quoting *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)), and that "an agency's interpretation of a regulation it promulgated [is] 'controlling' unless it is 'plainly erroneous,'" *ibid.* (quoting *Auer*, 519 U.S. at 461, and *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 (2009)). The court accordingly rejected Shaner's contention that the credit card issuer in that case had violated Regulation Z "by failing to provide notice of a rate increase on or before the effective date of the increase." *Id.* at 490; see *id.* at 493.

2. As respondent notes (Br. in Opp. 4-6), the division among the courts of appeals is of limited prospective significance in light of the 2009 amendments. The question is potentially outcome-determinative, however, in a number of pending cases challenging rate increases that

occurred before the 2009 amendments became effective. See Pet. 22-23 & n.4. If the decision below is allowed to stand, creditors will be exposed to needless litigation expenses and potential liability simply for complying with the Board's longstanding interpretation of its own regulations.

C. Further Consideration Is Warranted In Light Of The Board's Recent Authoritative Interpretation Of Its Regulations

The court of appeals in this case correctly observed that an agency's considered judgment about the meaning of its own regulation is entitled to deference unless the agency's construction is "plainly erroneous or inconsistent with the regulation." Pet. App. 4a (quoting *Auer*, 519 U.S. at 461). And while the court of appeals dismissed the Board's 2007 notice of its proposed rule on the ground that the notice's "tersely worded 'interpretations' of existing law are incidental to the purpose of the agency action," *id.* at 13a n.14, the court recognized that "[i]n *Auer*, [this Court] deferred to an interpretation of a rule contained in an agency's legal brief that was directed specifically to the 'matter in question,'" *ibid.* (quoting *Auer*, 519 U.S. at 462). The Board's amicus brief in *Shaner* was filed approximately seven months after the Ninth Circuit issued its decision in this case. That brief represents the agency's considered judgment, and it was drafted and filed for the specific purpose of clarifying the agency's interpretation of its own pre-amendment regulation with respect to the precise question that is presented here. See *Shaner*, 587 F.3d at 493. That amicus brief details why the central premise of the decision below—that the Board interprets its own pre-

amendment regulation to require disclosure in these circumstances—is incorrect.[4]

Under these circumstances, and given the continuing importance of the issue in this and other pending cases, the Court should vacate the court of appeals' judgment and remand the case to allow the court below to revisit its conclusion in light of the Board's authoritative construction of its pre-2009 regulations. See Pet. Reply Br. 10-11.[5] Such an order is appropriate "[w]here intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). In *Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006), the Court granted, vacated, and remanded to allow the Second Circuit to consider a Department of Labor advisory memorandum, issued after the court of appeals had rendered its initial decision, clarifying the agency's interpretation of the

---

[4] Petitioner has submitted a letter requesting permission to lodge with this Court the Board's amicus brief in *Shaner*. See Pet. Reply Br. 2 n.1.

[5] Respondent acknowledges (Br. in Opp. 6-7) the significance of the Board's amicus brief in *Shaner*, but suggests that the appropriate course would be to deny further review and instead to permit petitioner to raise the *Shaner* brief in support of a good-faith defense to liability under 15 U.S.C. 1640(f). It is not clear, however, that the decision below would permit petitioner to raise such an argument. See Pet. App. 13a n.14 (stating that the good-faith defense "is only available for actions based on the Official Staff Commentary," and suggesting that the defense is not available for actions based on other interpretations "promulgated after this suit was filed" and that "could not have been relied upon when [petitioner] acted").

regulation at issue in the case. See Pet. Reply Br. 11. Because the Board interpretation of pre-amendment Regulation Z set forth in the *Shaner* amicus brief is similarly entitled to judicial deference, see *Auer*, 519 U.S. at 462, the same disposition is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position expressed in the Board's amicus brief in *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009).

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
MICHAEL S. RAAB
MATTHEW M. COLLETTE
Attorneys

SCOTT G. ALVAREZ
General Counsel
RICHARD M. ASHTON
Deputy General Counsel
KATHERINE H. WHEATLEY
Associate General Counsel
Board of Governors of the Federal Reserve System

MAY 2010

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
C. FREDERICK BECKNER III
BRYSON L. BACHMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae
* Counsel of Record

October 16, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE NINTH CIRCUIT'S HOLDING IS CONTRARY TO THE FEDERAL RESERVE BOARD'S REGULATIONS AND IS IN CONFLICT WITH EVERY OTHER COURT THAT HAS DECIDED THE ISSUE	5
II. THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE BOARD'S PUBLISHED INTERPRETATIONS OF REGULATION Z CONTRAVENES DECISIONS OF THIS COURT AND OTHER CIRCUITS AND UNDERMINES BANKS' ABILITY TO RELY ON BOARD GUIDANCE	9
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Akzo Nobel Salt, Inc. v. *Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301 (D.C. Cir. 2000) 16
Am. Fed'n of State, County & Mun. Employees v. *Am. Int'l Group, Inc.*, 462 F.3d 121 (2d Cir. 2006) 15, 16
Anderson Bros. Ford v. *Valencia*, 452 U.S. 205 (1981) 13
Auer v. *Robbins*, 519 U.S. 452 (1997) .....*passim*
Belt v. *EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006) 17
Bigelow v. *Dep't of Def.*, 217 F.3d 875 (D.C. Cir. 2000) 17
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 14, 15
Christensen v. *Harris County*, 529 U.S. 576 (1999) 15
Conn. Gen. Life Ins. Co. v. *Comm'r*, 177 F.3d 136 (3d Cir. 1999) 16
EEOC v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988) 15
Ehlert v. *United States*, 402 U.S. 99 (1971) 15
Evans v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008) 6
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 4, 9, 13, 15, 18
Gardebring v. *Jenkins*, 485 U.S. 415 (1988) 15, 16
Glen Coal Co. v. *Seals*, 147 F.3d 502 (6th Cir. 1998) 17
INS v. *Stanisic*, 395 U.S. 62 (1969) 15
IntraComm, Inc. v. *Bajaj*, 492 F.3d 285 (4th Cir. 2007) 17

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 15, 16
Lyng v. *Payne*, 476 U.S. 926 (1986) 15
Martin v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) 12, 15
Mourning v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973) 10, 18
Mullins Coal Co. v. *Dir., Office of Workers' Compensation Programs, Dep't of Labor*, 484 U.S. 135 (1987) 15
N. Ind. Pub. Serv. Co. v. *Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12 (1975) 15
Pauley v. *Bethenergy Mines, Inc.*, 501 U.S. 680 (1991) 15
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 15
Shaner v. *Chase Bank USA, N.A.*, 570 F. Supp. 2d 195 (D. Mass. 2008), *appeal pending*, No. 09-1157 (1st Cir. Jan. 30, 2009) 6
Swanson v. *Bank of Am., N.A.*, 563 F.3d 634 (7th Cir. 2009) 4, 6, 8
Swanson v. *Bank of Am., N.A.*, 559 F.3d 653 (7th Cir. 2009) 3
Swanson v. *Bank of Am., N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir.), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009) 5
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 15
Udall v. *Tallman*, 380 U.S. 1 (1965) 15
United States v. *Hoyts Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004) 16
United States v. *Larionoff*, 431 U.S. 864 (1977) 15

STATUTES AND REGULATIONS

15 U.S.C. § 1601 *et seq* 2
12 C.F.R. pt. 226..... 2
pt. 226, supp. I, cmt. ¶ 9(c)-1..... 3, 7
pt. 226, supp. I, cmt. ¶ 9(c)(1)-3 ... 4, 7
§ 226.6(a)(2) 2
§ 226.9 ..... 2, 6, 8
69 Fed. Reg. 70,925 (Dec. 8, 2004)..... 3, 10
72 Fed. Reg. 32,948 (June 14, 2007)..... 3, 10, 11
74 Fed. Reg. 36077 (July 22, 2009)..... 2
Fed. Reserve Sys., Proposed rule; request for public comment (Sept. 28, 2009), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090929a1.pdf 12

INTEREST OF *AMICI CURIAE*[1]

Amici are associations whose members issue credit cards that are subject to the Truth in Lending Act ("TILA") and Regulation Z. The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are located in each of the 50 States and the District of Columbia. ABA members hold a substantial majority of domestic assets of the banking industry of the United States. The Consumer Bankers Association ("CBA") represents most of the nation's largest bank holding companies, institutions holding two thirds of the industry's total assets. Its member institutions are leaders in consumer financial services, including credit cards.

Amici believe that this case raises important issues with regard to the role of the Board of Governors of the Federal Reserve System ("the Board" or "the Federal Reserve Board") in implementing Regulation Z and the ability of industry to rely upon the Board's pronouncements. *Amici* further believe that this case raises important issues regarding the legal effect of the Board's interpretations of its own regulations.

Amici have a strong interest in defending the validity of the Board's interpretation of Regulation Z in this case. The decision below failed to defer to the Board's controlling views of its own regulations. In so

---

[1] Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and no person or entity other than an *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for both parties have received timely notice of intent to file this brief and have consented to the filing, and the letters of consent have been filed with the clerk.

doing, the panel has upset long-settled expectations in the industry. The default rate provision that the Ninth Circuit held to be in violation of Regulation Z is very common in the industry. And, as a result of the Ninth Circuit's ruling, numerous lawsuits seeking enormous penalties have been filed in courts in the Ninth Circuit against banks that constitute approximately 50 percent of the credit card industry. This spate of litigation is particularly alarming because the claims are based on conduct that the industry reasonably believed was in full compliance with the Board's regulations, as interpreted by the Board itself.

SUMMARY OF ARGUMENT

This case involves the obligations of credit card issuers to make certain disclosures to customers under TILA, 15 U.S.C. §§ 1601 *et seq.*, as implemented by the Federal Reserve Board in Regulation Z, 12 C.F.R. pt. 226. Regulation Z provides for broad initial disclosures by credit card issuers to their customers at the outset of the credit relationship, including the disclosure of "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Another provision of Regulation Z requires a credit card issuer to give written notice ("change-in-terms notice") of any "change[s]" it seeks to make to the basic terms of the credit relationship. *Id.* § 226.9(c).[2]

---

[2] The Board recently adopted regulations that require a change-in-terms notice in the circumstances presented in this case. *See* 74 Fed. Reg. 36077, 36095 (July 22, 2009). Those regulations, which took effect on August 20, 2009, are prospective and do not moot this case or any other potential lawsuits based on the Board's regulations at issue in this case. For simplicity, all citations in this brief to Regulation Z and to

In its Official Staff Commentary, the Board made clear that the § 226.9(c) change-in-terms notice does *not* apply to rate increases that are specifically provided for in the cardholder's initial agreement. 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1 ("Comment 9(c)-1"). Moreover, the Board stated in related formal rulemaking proceedings that Regulation Z does not require a change-in-terms notice for a periodic rate increase that results from the implementation of a default provision that is specified in advance in the account agreement. See 69 Fed. Reg. 70925, 70931–32 (Dec. 8, 2004); 72 Fed. Reg. 32948, 33009 (June 14, 2007). Nonetheless, in the decision below, a divided panel of the Ninth Circuit held that § 226.9(c) requires that written notice be given for an increase in a credit card rate, even if that increase is merely the implementation of a default provision that was set forth in the initial disclosure to the customer.

In so holding, the panel's decision is in conflict with every other court that has considered this issue, including the nearly contemporaneous decision of the Seventh Circuit in *Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009). Indeed, to *amici*'s best knowledge, the two members of the Ninth Circuit panel majority are the only judges who have ever reached the conclusion that notice was required in these circumstances.

The decision below is plainly wrong. In concluding that Regulation Z requires notice for implementation of a default rate provision, the Ninth Circuit panel misinterpreted an Official Staff Comment that speaks directly to the issue of whether notice is required. Comment 9(c)-1. Instead, the court based

---

the Board's Commentary are to the versions in effect before August 20, 2009.

its holding on a Comment from a separate section of the Board's Commentary that applies to considerations of timing that are only relevant if it has already been determined that notice is required. See 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)(1)-3 ("Comment 9(c)(1)-3"); see, *e.g.*, *Swanson* v. *Bank of Am. N.A.*, 563 F.3d 634, 635 (7th Cir. 2009).

Strikingly, the Ninth Circuit panel also failed to defer to the Board's statements in related notices of proposed rulemaking that Regulation Z does *not* require written notice under the circumstances of this case. In so doing, the panel misunderstood this Court's precedent establishing that unless "plainly erroneous or inconsistent with the regulation," an agency's "fair and considered" interpretation of its own regulation is controlling. *Auer* v. *Robbins*, 519 U.S. 452, 461–62 (1997) (internal quotation marks omitted). Moreover, the Ninth Circuit's holding has created a circuit split with those circuits that have correctly read the Supreme Court's precedent.

Perhaps even more critically, the Ninth Circuit's failure to defer to the Board undermines the banking industry's ability to rely on the Board's expertise in a "highly technical" area of law where "creditors need sure guidance." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980) (internal quotation marks omitted). Congress "specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law," and has "promote[d] reliance upon Federal Reserve pronouncements." *Id.* The issue for *amici* is not only one of fundamental fairness, but of business necessity. Having relied upon the Board's guidance, the Ninth Circuit's decision now imposes potentially significant liability on the industry as a result of that reliance. Moreover, if courts do not

defer to direct and unambiguous statements by the Federal Reserve Board as to its views of its own regulations, then it is unclear when, if ever, the industry can rely on informal guidance from the agency.

For these reasons, and as shown below, this Court should grant review and reverse the decision of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING IS CONTRARY TO THE FEDERAL RESERVE BOARD'S REGULATIONS AND IS IN CONFLICT WITH EVERY OTHER COURT THAT HAS DECIDED THE ISSUE.

The Ninth Circuit's ruling incorrectly interprets the text of Regulation Z and the Board's Official Staff Commentary. Its holding also creates a circuit split that has the effect of exposing a substantial portion of the industry to the burdens and risks of litigation.

1. A clear conflict among the circuits exists on the issue presented in the petition for certiorari. In a decision nearly contemporaneous with that of the Ninth Circuit here, the Seventh Circuit, in direct conflict with the Ninth Circuit, held that creditors need not provide an additional notice for a rate increase made pursuant to a previously disclosed default provision analogous to the one at issue in the decision below. See *Swanson* v. *Bank of Am., N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir.), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009).

Similar suits have been filed in a number of jurisdictions. With the exception of the two judges on

the panel in this case, every judge to address whether Regulation Z requires an additional written notice for a credit card rate increase pursuant to a previously disclosed default provision has concluded that it does not. See Pet. 22 n.4 (listing cases).[3] This includes an earlier Ninth Circuit panel that found the issue sufficiently straightforward that it designated its opinion nonprecedential. See *Evans* v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008); see also *Swanson*, 563 F.3d at 635 (commenting on the unpublished status of *Evans* and noting that "nonprecedential decisions should be used only when the legal issue is clear enough that all reasonable judges will come out the same way").

2. In reaching a decision contrary to that reached by all other courts presented with the issue, the Ninth Circuit misinterpreted the Board's regulations. The plain text of Regulation Z provides that written notice is required only when a "term" is "changed." 12 C.F.R. § 226.9(c)(1). Yet, the panel below found the regulation "ambiguous" with respect to whether it applied to an increase in a periodic rate that implements an *unchanged*, previously disclosed contractual *term*. Pet. App. 4a. To resolve this purported ambiguity, the panel looked to the Board's Official Staff Commentary. It relied, however, on the wrong Comment.

Comment 9(c)-1 is subtitled "*Changes* initially disclosed," and sets forth the types of changes for

---

[3] The issue is also pending in the First Circuit. *See Shaner* v. *Chase Bank USA, N.A.*, 570 F. Supp. 2d 195 (D. Mass. 2008), *appeal pending*, No. 09-1157 (1st Cir. Jan. 30, 2009). Whatever the result in that case, the circuit split will only deepen, as the legal consequences for causes of action in that jurisdiction will differ from those faced by banks sued for the same conduct in either the Seventh or the Ninth Circuit.

which "[n]o notice of a change in terms need be given," including increases in periodic rates that are "set forth initially." (Emphasis in original). Comment 9(c)(1)-3 appears in a different section of the Board's commentary and is subtitled "*Timing—advance notice not required*," (emphasis in original), and states the circumstances in which a change in contractual *terms* does not require the usual 15-day advance notice but instead requires contemporaneous notice. Whereas Comment 9(c)-1 states when a change in notice is required, Comment 9(c)(1)-3 states when an already required notice must be given. Because notice in this instance is not required under Comment 9(c)-1, Comment 9(c)(1)-3 does not apply.

Notwithstanding the obvious interplay between Comment 9(c)-1 and Comment 9(c)(1)-3, the Ninth Circuit found Comment 9(c)(1)-3 to be "the most salient Official Staff Commentary to § 226.9(c)(1)." Pet. App. 4a. It thus held that because Comment 9(c)(1)-3 discusses providing notice to cardholders of increases in periodic rates, banks are required to give written notice even of rate increases that simply implement a previously disclosed default provision. See *id.*

Ironically, the panel mused over the fact that "most of the[] courts [addressing this issue] did not even discuss Comment [9(c)(1)-]3." Pet. App. 12a. The panel observed that perhaps these courts were "labor[ing] under the misconception" that Comment 9(c)(1)-3 "did not apply where the conditions specified in Comment [9(c)-]1 are met." *Id.* That "misconception," however, is exactly what the text and the structure of the Official Staff Commentary clearly declare is the correct interpretation. As the Seventh Circuit succinctly explained, "[C]omment [9(c)(1)-]3 addresses *when* notices that are required by the

regulation . . . must be sent. Nothing in comment [9(c)(1)-]3, which says that notice need not be 'advance' in defined circumstances, provides that notice is required in the first place." *Swanson*, 563 F.3d at 636.[4]

3. As a direct result of the panel's erroneous interpretation of Regulation Z, credit card issuers have been subject to a flood of lawsuits in the Ninth Circuit. The default rate provision at issue in the decision below is very common in the industry. And in the months since the Ninth Circuit's decision in *McCoy*, plaintiffs have brought suit in the Ninth Circuit against banks representing an estimated 50

---

[4] The Ninth Circuit stated that even if it believed that Comment 9(c)-1 applied, it "would still hold that Comment [9(c)]-1 does not dispel Chase's obligation to notify its account holders of discretionary rate increases." Pet. App. 5a. The panel's rationale for this conclusion, however, is flawed. The panel asserted that, because Chase's default provision provided for a range up to which the bank could increase the periodic rate, the provision was discretionary and non-specific, and therefore would not be covered by Comment 9(c)-1. *Id.* at 5a–9a. As the dissent pointed out, however, Chase's provision was very specific. It "set forth a specific change and disclosed the specific terms for that change." *Id.* at 30a. The panel also incorrectly determined that Comment 9(c)-1 requires that a bank not have any discretion with regard to raising a periodic rate. In two of the examples used in Comment 9(c)-1 to illustrate acceptable practices, the bank had discretion not to impose a higher rate. *Id.* at 31a–32a. Finally, it would make no sense to punish the bank for retaining (or exercising) the ability not to increase the cardholder's rates to the maximum. The default provision at issue in this case is no different from a situation in which a Bank imposes a mandatory rate increase, then chooses to immediately decrease the rate. Notice would plainly not be required in that instance, and it should not be required for the implementation of Chase's default provision, because Regulation Z does not require advanced notice for a decrease in the periodic rate. 12 C.F.R. § 226.9(c)(2).

percent of the credit card industry. See Pet. 21–22. It is clearly inappropriate to expose credit card issuers to this type of litigation risk and cost when the Board had repeatedly and clearly stated that no additional customer notification was necessary for interest rate increases that implement previously disclosed default terms.

II. THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE BOARD'S PUBLISHED INTERPRETATIONS OF REGULATION Z CONTRAVENES DECISIONS OF THIS COURT AND OTHER CIRCUITS AND UNDERMINES BANKS' ABILITY TO RELY ON BOARD GUIDANCE.

The foregoing considerations are by themselves sufficient to support a grant of certiorari in this case. But certiorari is also independently warranted because the panel made a fundamental error in refusing to defer to the Board's stated views as to the proper interpretation of Regulation Z. This failure to defer to the Board's interpretation of its own regulations conflicts with the holdings of this Court and numerous other courts of appeals. This failure also exposes banks to litigation costs and risk for commonplace conduct that the Board stated was lawful.

1. TILA is "highly technical" in nature, and creditors need "sure guidance" as to the meaning and scope of its provisions. *Milhollin*, 444 U.S. at 566 (internal quotation marks omitted). Accordingly, Congress "specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law," and has "promote[d] reliance upon Federal Reserve pronouncements." *Id.*; see also *id.* at 567–68 (explaining that Congress's enactment and expansion

of 15 U.S.C. § 1640(f), which provides creditors immunity based on good-faith compliance with Board interpretations, "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative"); *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973) ("Congress determined to lay the structure of the [Truth in Lending] Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation.").

Notwithstanding the role assigned to the Board by Congress, the panel concluded that it would *not* give any weight to statements made by the Board that were directed precisely to the issue in the case. More specifically, in a 2004 Advanced Notice of Proposed Rulemaking issued to seek public comment for a general review of Regulation Z's open-end credit rules, and again in a 2007 Proposed Rule and Request for Public Comment that took into account public comments from the 2004 Notice, the Board expressly stated that "[b]ecause the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice" for "interest rate or other finance charge increases due to a consumer's default or delinquency." 72 Fed. Reg. at 33009; 69 Fed. Reg. at 70931–32 (The 2004 statement varies slightly in word choice, but is otherwise identical to the 2007 statement.). The panel, however, characterized the Board's statements as "terse[]," "conclusory," "ambiguous," and "superceded" [sic], and concluded that it need not defer to "incidental descriptions of current law contained in an [Advanced Notice of Proposed Rulemaking]," regardless of the clarity and consideration with which the Board had set forth its interpretation. Pet. App. 13a n.14.

The panel's reasons for refusing to defer to the Board are unpersuasive. It is unclear what the panel meant by characterizing the Board's interpretations as "incidental." Although the Board's statements were not the primary subject of the rulemaking proceeding concerning whether to expand existing notice obligations, a discussion of the correct state of the law on disclosure is obviously highly relevant—and not "incidental"—to consideration of whether the law should be changed. In any event, the panel cites no authority suggesting that only commentary that is directly about the proposed regulation is of any legal consequence, and there is in fact no such authority. To the extent the panel meant to imply that the interpretations did not address the issue before the court, its statement was incorrect. The Board plainly stated that Regulation Z does not apply to periodic rate increases pursuant to a previously disclosed default provision.[5]

---

[5] The Board's interpretation, in relevant part, reads as follows:

> Advance notice currently is not required in all cases. For example, if an interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. See current § 226.9(c)(1); comment 9(c)(1)-3. Furthermore, no change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs.

72 Fed. Reg. at 33009.

The panel's attempts to minimize the Board's interpretations ("terse," "conclusory," "ambiguous," and "super[s]eded") are likewise without support. Congress has empowered agencies to interpret their own regulations, and has nowhere stated that this authority does not exist if the agency's interpretation is "terse" or "conclusory." See *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the Court] presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."). Surely, agency statements that succinctly and directly interpret a regulation merit the same deference as lengthy or verbose interpretations. Finally, the Board's interpretation, as explained above, was far from "ambiguous," and at no time has it been "superceded."[6]

---

[6] The Board's interpretation of § 226.9(c) has in fact been confirmed several times since 2007. *See* Pet. 29 n.7 (collecting examples). In particular, it is noteworthy that the Board's new regulation, which prospectively requires advance notice of rate increases due to cardholder default, lodges the new requirement in 12 C.F.R. § 226.9(g). It does so because, as the Board confirmed as recently as September 28, 2009, the implementation of a default rate does not come within the "change-in-terms" rule set forth in § 226.9(c). *See* Fed. Reserve Sys., Proposed rule; request for public comment, 88 n.13 (Sept. 28, 2009), *available at* http://www.federalreserve.gov/newsevents press/bcreg/bcreg20090929a1.pdf ("Consistent with the approach it took in the January 2009 Regulation Z Rule and the July 2009 Regulation Z Interim Final Rule, the Board is implementing the advance notice requirements applicable to contingent rate increases set forth in the cardholder agreement in a separate section (§ 226.9(g)) from those advance notice requirements applicable to changes in the cardholder agreement (§ 226.9(c)).

The support the panel did offer for its conclusion actually cuts against the position it took. The panel cited *Milhollin*, 444 U.S. at 566; *Auer*, 519 U.S. at 462; and *Anderson Brothers Ford* v. *Valencia*, 452 U.S. 205, 213, 217 (1981). As the dissent correctly points out, however, all three cases in fact support the proposition that courts should defer to an agency's interpretation of its own regulations in Federal Register statements such as the ones at issue in this case. See Pet. App. 23a–27a (Cudahy, J., dissenting).

In *Anderson*, this Court stated that a proposed official staff interpretation constitutes "persuasive authority" and concluded that it could *not* "agree that the staff's views expressed in the proposed ruling are wholly without significance." 452 U.S. at 212–13, 217; see also *id.* at 219 (stating that although the Board's interpretation of TILA was not conclusive, "absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, *as should the Board's interpretation of its own regulation*") (emphasis added). In *Milhollin*, the Court likewise broadly deferred to the agency's interpretation of its own regulation, emphasizing that "[the] traditional acquiescence in administrative expertise is particularly apt under TILA." 444 U.S. at 566; see also Pet. App. 25a (Cudahy, J., dissenting) (explaining that even if *Milhollin*'s distinction between "official" and "unofficial" interpretations did apply to the question

---

The distinction between these types of changes is that § 226.9(g) addresses changes in a rate being applied to a consumer's account consistent with the existing terms of the cardholder agreement, while § 226.9(c) addresses changes in the underlying terms of the agreement.").

of deference to an agency interpretation, the Board's interpretation in this case would qualify as "official").

Finally, in *Auer*, the Court accorded "controlling" deference to an agency interpretation offered in a legal brief. See 519 U.S. at 461–62. The Ninth Circuit panel asserted that the Board's statements, unlike the legal brief in *Auer*, were not directed specifically to the matter in question. See Pet. App. 13a n.14. But, as explained above, the Board's statements were quite plainly addressed specifically to the legal issue presented to the court. See *supra* at 11; see also Pet. 27–33 (setting forth the Board's statements and correctly noting that it is beyond serious question "[t]hat the Board's Federal Register notices were specifically directed to the issue at hand, and that they stated the Board's considered views"). And there is no legal significance to the fact that the notices of proposed rulemaking were not solely dedicated to this one interpretive issue. See *infra* at 14–16. Moreover, to the extent the panel is asserting that legal briefs should generally be accorded more deference than statements in the Federal Register, it is noteworthy that Chase urged the panel to request the Board to present its views to the court to assist the court in considering whether to rehear the case; but the court denied the rehearing petition without comment. See Pet. App. 49a–50a.

2. The implications of the Ninth Circuit's failure to defer to the Board's interpretation of Regulation Z extend well beyond this case. The panel's conclusion is in conflict with decisions of this Court, as well as the decisions of several circuits, which have correctly understood this Court's precedents.

In a long line of cases that began with *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), this Court has held that where an agency interprets

its own regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.*; see also *Udall* v. *Tallman*, 380 U.S. 1, 16–17 (1965); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971); *N. Ind. Pub. Serv. Co.* v. *Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam); *United States* v. *Larionoff*, 431 U.S. 864, 872–73 (1977); *Milhollin*, 444 U.S. at 566; *Mullins Coal Co.* v. *Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 484 U.S. 135, 159 (1987); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991); *Martin*, 499 U.S. at 150–51; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Auer*, 519 U.S. at 461; *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007).

This Court has made clear that *Chevron* deference is not owed to an agency interpretation of a *statute* it administers if that interpretation is contained only in an opinion letter, policy statement, agency manual, or enforcement guideline, "all of which lack of the force of law." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). But, relevant here, this Court has held that deference to an agency's interpretation of its own *regulations is* warranted so long as the interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.[7]

---

[7] *Accord Am. Fed'n of State, County & Mun. Employees* v. *Am. Int'l Group, Inc.*, 462 F.3d 121, 126 (2d Cir. 2006) (explaining that "while agency interpretations that lack the force of law do

Accordingly, this Court has deferred to agency interpretations of regulations where they appear in a legal brief, *id.*; *Gardebring*, 485 U.S. at 430, or in an "Advisory Memorandum" issued only to internal agency personnel and which the agency appeared to have written in response to the pending litigation, *Long Island Care at Home, Ltd.*, 551 U.S. at 171 (internal quotation marks omitted).

Faithfully applying this Court's precedent, the courts of appeals have likewise deferred to an agency's interpretations of its own regulations in a variety of informal settings. See *United States* v. *Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004) (deferring to an agency's interpretation even though the agency's "gloss" came "only in a brief rather than in some more formal manner (*e.g.*, an interpretive ruling)"); *Am. Fed'n of State, County & Mun. Employees* v. *Am. Int'l Group, Inc.*, 462 F.3d 121, 126 (2d Cir. 2006) (deferring to an agency interpretation provided in a proposed amendment to the regulation and stating that "[w]hen the language of a regulation is ambiguous, we typically look for guidance in *any* interpretation made by the agency that promulgated the regulation in question") (emphasis added); *Conn. Gen. Life Ins. Co.* v. *Comm'r*, 177 F.3d 136, 144 (3d Cir. 1999) (deferring to an agency interpretation offered as a "'mere' litigating

---

not warrant deference when they interpret ambiguous *statutes*, they do normally warrant deference when they interpret ambiguous *regulations*") (emphasis in original); *Akzo Nobel Salt, Inc.* v. *Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) ("[A]gency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) do not warrant *Chevron*-style deference when they interpret ambiguous *statutes* but do receive deference under *Auer* when interpreting ambiguous *regulations*.") (emphasis in original) (internal quotation marks omitted).

position"); *IntraComm, Inc.* v. *Bajaj*, 492 F.3d 285, 293 (4th Cir. 2007) (deferring to an agency interpretation offered in an amicus brief); *Belt* v. *EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (deferring to informal agency interpretive statements in an opinion letter, handbook, and amicus brief); *Glen Coal Co.* v. *Seals*, 147 F.3d 502, 521 (6th Cir. 1998) (deferring to an agency interpretation offered as a "litigating position"); *Bigelow* v. *Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) (deferring to an interpretation of regulations set forth by government counsel in its brief).

In many of the above-cited decisions, courts deferred to agency interpretations embodied in considerably less formal statements than those made by the Board regarding application of Regulation Z to rate increases pursuant to a default provision. The Board's plain and repeated statements—made in formal, notice-and-comment rulemaking preambles published in the Federal Register and intended as explanations of the current state of the law—plainly "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. Nonetheless, and despite this clear and abundant precedent, the Ninth Circuit majority not only stated that it was an open question as to whether deference was owed "to an agency's characterizations of existing law when they are incidental to the purpose of an agency publication," Pet. App. 12a–13a, but also concluded that the Board's statements did not merit deference. That holding is flatly wrong.

3. In failing to defer to the Board's interpretation of its own regulations, the holding below frustrates the purposes of TILA and undermines the banking industry's ability to rely on guidance from the Board. As noted, Congress expressly intended for entities

regulated by TILA to be able to rely on the Board's construction and implementation of that statute. See *Milhollin*, 444 U.S. at 566; *Mourning*, 411 U.S. at 365.

In practice, the industry commonly relies on informal guidance from the Board. It is understood in the industry that such mechanisms are used by the Board to offer guidance regarding its complex regulations, especially when doing so through more formal means would be too slow or cumbersome. If, however, the industry cannot rely upon plain and repeated statements from the Agency, then it is unclear when, if ever, banks may rely upon statements from the Board that have not been formalized in regulations. If allowed to stand, the decision below will leave credit card issuers confused as to the authority of the Board, and will greatly diminish the guidance available to the industry as it attempts to lawfully navigate a complex regulatory regime. The decision below will also fragment the uniform administration of truth-in-lending law that Congress sought to establish when it enacted TILA. See *Milhollin*, 444 U.S. at 568 (discussing Congress's "decided preference for resolving interpretive issues [related to truth-in-lending law] *by uniform administrative decision*, rather than piecemeal through litigation") (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
C. FREDERICK BECKNER III
BRYSON L. BACHMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

October 16, 2009

* Counsel of Record

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 26 2010
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

334

QUESTION PRESENTED

The applicable version of Regulation Z, the Federal Reserve Board's regulation implementing the Truth in Lending Act, required credit card issuers to provide an initial disclosure statement, before a cardholder completed any transaction on his or her account, containing "each periodic [interest] rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2) (2004). It also required that when a card issuer later changed any term required to be disclosed in the initial disclosure statement, the card issuer "mail or deliver written notice" of that change in terms before the effective date of the change. *Id.* § 226.9(c).

Credit card issuers generally provided the requisite initial disclosures in or with the contract that governs the credit card account. Such contracts commonly specified an initial periodic rate of interest and also specified that, if the cardholder defaulted in a certain manner, the issuer could increase the rate on the account up to an identified maximum, with the new rate applied as of the beginning of the billing cycle in which the default occurred.

The question presented is:

When a credit card issuer increased the periodic interest rate on a card account in response to a cardholder default and pursuant to a previously disclosed default-rate term, did the applicable version of Regulation Z require the issuer to provide the cardholder with notice of a change in terms even though the contractual terms governing the account had not changed?

RULE 29.6 STATEMENT

Petitioner Chase Bank USA, N.A., formerly known as Chase Manhattan Bank USA, N.A., is a wholly owned indirect subsidiary of JPMorgan Chase & Co. No publicly held corporation owns 10 percent or more of the stock of JPMorgan Chase & Co.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

REGULATION INVOLVED 2

INTRODUCTION 3

STATEMENT 5

A. Industry Practices Regarding Interest-Rate Increases Triggered By Customer Defaults 5

B. Regulation Z Disclosure Requirements 7

C. Recent Revisions To Regulation Z 11

D. Proceedings Below 13

E. The Board's Amicus Brief In *Shaner* 16

SUMMARY OF ARGUMENT 18

ARGUMENT 20

I. THE FEDERAL RESERVE BOARD'S AMICUS BRIEF IN *SHANER* PROVIDES A CLEAR—AND CONTROLLING—ANSWER TO THE QUESTION PRESENTED, AS DOES THE SOLICITOR GENERAL'S INVITATION BRIEF HERE 20

TABLE OF CONTENTS—Continued

Page

A. The Amicus Briefs Unambiguously State That Regulation Z Did Not Require Provision Of A Change-In-Terms Notice Here 21

B. Under This Court's Precedent, The Views Expressed By The Board Warrant Great Deference 25

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS EVEN WITHOUT REGARD TO THE AMICUS BRIEFS 30

A. The Panel Majority Misunderstood The Regulation And Accompanying Official Staff Commentary 30

B. The Panel Majority Improperly Rejected The Board's Federal Register Statements That A Change-In-Terms Notice Was Not Required For The Implementation Of Default Rates 32

CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Page(s)

Anderson Brothers Ford v. *Valencia*, 452 U.S. 205 (1981) 7, 37

Auer v. *Robbins*, 519 U.S. 452 (1997) ..... *passim*

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 29

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 25, 36, 37

Evans v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008) 14, 15

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 33

Ford Motor Credit v. *Milhollin*, 444 U.S. 555 (1980) ..... *passim*

Household Credit Services, Inc. v. *Pfennig*, 541 U.S. 232 (2004) 29

Kennedy v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009) 25, 29

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 25, 29

Martin v. *Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991) 37

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) 26

Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 25

Shaner v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009) 17

Swanson v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied with op.*, 563 F.3d 634 (7th Cir. 2009) 16, 29, 36

Thomas Jefferson University v. *Shalala*, 512 U.S. 504 (1994) 26, 37

STATUTES AND REGULATIONS

15 U.S.C.
§§ 1601 *et seq.* 2
§ 1604 7
§ 1640(f) 7

28 U.S.C. § 1254(1) 2

Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 13

Truth in Lending Act of 1968, Pub. L. No. 90-321, tit. 1, 82 Stat. 146 2

Del. Code Ann., tit. 5, § 952 7

S.D. Codified Laws §§ 54-11-10, -11 7

Regulation Z, 12 C.F.R. pt. 226 ..... 2, 7

TABLE OF AUTHORITIES—Continued

Page(s)

12 C.F.R.
§ 226.5 (2004) 8, 9, 27
§ 226.6 (2004) 3, 8, 30
§ 226.7 (2004) 11
§ 226.9 (2004) ..... *passim*
§ 226.9 (2010) 36

12 C.F.R. pt. 226, supp. I
cmt. ¶ 1-1 7
cmt. ¶ 6(a)(2)-11 ..... 8, 30, 31
cmt. ¶ 7(d)-2 11
cmt. ¶ 9(c)-1 ..... *passim*
cmt. ¶ 9(c)(1)-3 ..... *passim*

Truth in Lending, 74 Fed. Reg. 36,077 (July 22, 2009) (interim final rule) 13

Truth in Lending, 74 Fed. Reg. 5,244 (Jan. 29, 2009) (final rule) ..... *passim*

Truth in Lending, 72 Fed. Reg. 32,948 (June 14, 2007) (proposed rule) ..... *passim*

Truth in Lending, 69 Fed. Reg. 70,925 (Dec. 8, 2004) (advance notice of proposed rule-making) 12

OTHER AUTHORITIES

Brief for the Board of Governors of the Federal Reserve System as *Amicus Curiae* at the Request of the Court, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. Oct. 22, 2009) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Brief of Amicus Curiae Robert A. Glen, Delaware State Banking Commissioner, In Support of the Appellee's Petition for Panel Rehearing and Rehearing *En Banc* and Supporting Affirmance at 10, *McCoy* v. *Chase Manhattan Bank, USA, N.A.*, No. 06-56278 (9th Cir. May 6, 2009) 28

Furletti, Mark *Credit Card Pricing Developments and Their Disclosure* (Federal Reserve Bank of Philadelphia Jan. 2003) 5

IN THE

Supreme Court of the United States

No. 09-329

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 559 F.3d 963. The court's order denying rehearing and rehearing en banc (Pet. App. 49a-50a) is unreported, as is the district court's order dismissing respondent's complaint (Pet. App. 35a-36a). The district court's opinion explaining the dismissal (Pet. App. 37a-47a) is not reported in the *Federal Supplement* but is available at 2006 U.S. Dist. LEXIS 97257.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on June 16, 2009. Pet. App. 49a. The petition for a writ of certiorari was filed on September 14, 2009, and granted on June 21, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATION INVOLVED

This case involves a prior version of Regulation Z, 12 C.F.R. pt. 226, the Federal Reserve Board's regulation implementing the Truth in Lending Act (TILA), Pub. L. No. 90-321, tit. 1, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601 *et seq.*). Two provisions from that version are particularly relevant here:

> § 226.6. Initial disclosure statement.
>
> The creditor shall disclose to the consumer, in terminology consistent with that to be used on the periodic statement, each of the following items, to the extent applicable:
>
> (a) *Finance charge.* The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows:
>
> * * *
>
> (2) A disclosure of each periodic [interest] rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. When different periodic rates apply to different types of transactions, the types of

transactions to which the periodic rates apply shall also be disclosed.

12 C.F.R. § 226.6 (2004) (footnotes omitted).

§ 226.9. Subsequent disclosure requirements.

* * *

(c) *Change in terms*—(1) *Written notice required.* Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.

12 C.F.R. § 226.9 (2004).

INTRODUCTION

For the period at issue in this case, the Federal Reserve Board's Regulation Z required credit card issuers to state, in "[i]nitial disclosure[s]," each periodic interest rate that "may" be used on a cardholder's account. 12 C.F.R. § 226.6(a)(2) (2004). Regulation Z separately required that issuers provide "[s]ubsequent disclo-

sure[s]" when "any term required to be disclosed under § 226.6 is changed." *Id.* § 226.9(c)(1).[1]

Misreading these provisions, a divided panel of the Ninth Circuit held that issuers must always provide notice of a change in terms, under § 226.9(c), when increasing a cardholder's interest rate because of a default—even when the increase is merely the *implementation* of a term previously disclosed in accordance with § 226.6 and not a *change* to any such term. In so holding, the panel majority failed to follow the Board's Official Staff Commentary to Regulation Z, which prescribes that "[n]o notice of a change in terms need be given if the specific change is set forth initially," 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1. The majority also wrongly disregarded explanations published by the Board in the Federal Register detailing the operation of its regulations. The decision below departs from that of every other federal court (indeed, every other federal judge) to have considered the same issue, including a prior Ninth Circuit panel.

Since the date of the Ninth Circuit's decision, the Board—at the invitation of the First Circuit—has made its view of its regulation indisputably clear, stating that no § 226.9(c) disclosure is required in the circumstances presented here. Especially in view of the Board's clearly stated and carefully considered views, and this Court's repeated and substantial deference to the Board regarding the interpretation of Regulation Z, the judgment of the court of appeals should be reversed.

---

[1] As explained in the petition (at 12-14) and below, *see* pp. 11-13, the Board recently amended Regulation Z's disclosure requirements. Those amendments do not apply to this case.

STATEMENT

A. Industry Practices Regarding Interest-Rate Increases Triggered By Customer Defaults

This case concerns what disclosures a credit card issuer must make under the Truth in Lending Act when it increases a cardholder's interest rate: (1) in response to a contractually-specified default (*e.g.*, a late or missed payment) and (2) pursuant to a previously-disclosed contract term authorizing such an increase. Such default-based rate increases are common in the credit card industry, as issuers often consider the increases necessary to compensate for the heightened risk revealed by the borrower's default.

Credit card issuers adjust interest rates in response to changed circumstances in two principal ways. The first is by implementing terms in the cardholder agreement under which the parties have agreed, *ex ante*, that different periodic rates may be applied in the future in specified circumstances. For example, a card agreement may provide as follows:

> We may increase the annual percentage rate on all balances to a default rate of up to 24.99 percent ... if you fail to make a payment to us or any other creditor when due, you exceed your credit line, or you make a payment to us that is not honored by your bank.

Mark Furletti, *Credit Card Pricing Developments and Their Disclosure* 9 (Federal Reserve Bank of Philadelphia Jan. 2003) (omission in original) (emphasis and internal quotation marks omitted). The major credit card issuers have long included such provisions in their contracts in one form or another. *See* Pet. 5-6 n.1. If the cardholder defaults, the issuer may increase rates pursuant to the already-disclosed contract term.

An alternative method by which a card issuer can adjust a cardholder's rates is to amend its contract with the cardholder. Credit card agreements invariably include a provision known as a "change-in-terms" or "reservation-of-rights" provision. These provisions allow the card issuer to change the previously-agreed contract terms (including the possible interest rates) as a condition of continuing to extend credit. *See, e.g.*, Pet. 5-6 n.1. Issuers use their reservation-of-rights authority to increase interest rates, in response to a cardholder's default, in ways not already disclosed to the cardholder. For example, the issuer might decide that the maximum default rate originally authorized by the agreement was inadequate to cover the additional lending risk revealed by a cardholder's default. The issuer would thus amend the contract, via its reservation-of-rights authority, to provide for a higher interest rate on the account.

The two ways in which an issuer may increase an interest rate have different substantive legal effects and practical ramifications. When a card issuer increases rates pursuant to an existing contractual term, the issuer's legal right to increase the rate is already established and there is no contractual requirement that the issuer delay implementation of the new rate. Typically, the increased rate takes effect the first day of the billing period during which the triggering event occurs, and applies to all existing balances.

By contrast, when a card issuer seeks to increase rates by changing the rate terms of the existing cardholder agreement, contract law requires an actual or legally implied agreement to the new terms. Under Delaware law, for example, the issuer must generally provide 15 days' written notice to the cardholder for an amendment to the credit card agreement that increases

the interest rate, identifying the proposed amendment and advising the cardholder of his right to opt out of the contractual change. The issuer may not apply the increased rate to the existing account balances of any cardholder who opts out of the amendment and abstains from further use of the account. *See* Del. Code Ann., tit. 5, § 952. Other state banking laws are similar. *See, e.g.*, S.D. Codified Laws §§ 54-11-10, -11.

B. Regulation Z Disclosure Requirements

TILA is a disclosure statute, imposing standardized disclosure obligations relating to credit transactions with consumers. Rulemaking authority is vested in the Federal Reserve Board, 15 U.S.C. § 1604, which has implemented the statute through Regulation Z, 12 C.F.R. pt. 226. Regulation Z is supplemented by an Official Staff Commentary. *See id.* supp. I. The Commentary "is the vehicle by which the staff ... of the Federal Reserve Board issues official staff interpretations of Regulation Z." *Id.* pt. 226, supp. I, cmt. I-1. This Court has noted that "Congress has conferred special status upon official staff interpretations," *Ford Motor Credit* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980), and accordingly the Court has treated a "proposed official staff interpretation" as evidence of the Board's interpretation of TILA, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 222 (1981). The Commentary is promulgated and revised through the same notice-and-comment process that applies to Regulation Z itself. *See, e.g.*, *Truth in Lending*, 74 Fed. Reg. 5,244, 5,450-5,498 (Jan. 29, 2009) (final rule). Good-faith compliance with Regulation Z or the Commentary is a defense to claims of a violation of TILA or the regulation. 15 U.S.C. § 1640(f).

The disclosure practices governed by Regulation Z are broad and intricate: The regulation and Commen-

tary fill more than 450 pages in the Code of Federal Regulations. The Board also frequently publishes revisions, together with explanations, of both the regulation and Commentary, in order to address new developments, uncovered ambiguities, and changes in law or policy. *See, e.g.*, *Truth in Lending*, 74 Fed. Reg. 5,244. From 2004 to the date of the petition for certiorari in this case, notices concerning revisions to Regulation Z and the Commentary, including explanatory material, consumed over 1,000 pages in the Federal Register. In light of the complex nature of the subject matter and Congress's delegation of broad interpretive authority to the Board, this Court has accorded substantial deference to the Board's expertise in Regulation Z matters. *See generally Ford Motor Credit*, 444 U.S. at 565.

Two provisions of the applicable version of Regulation Z are of primary relevance to this case. The first, 12 C.F.R. § 226.6, governs the "[i]nitial disclosure[s]" that credit card issuers must provide to a cardholder before any transaction on the account. During the period relevant to this case, § 226.6 required creditors to disclose "each periodic rate that *may* be used to compute the finance charge" under the terms of the governing contract. 12 C.F.R. § 226.6(a)(2) (2004) (emphasis added); *see also id.* § 226.5(b)(1) (requiring initial disclosure before any transactions occur on the account). This disclosure obligation included contractual default rates: "If the initial rate may increase upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose the initial rate and the increased penalty rate that may apply." *Id.* pt. 226, supp. I, cmt. ¶ 6(a)(2)-11. This default rate disclosure was required to "reflect the terms of the legal ob-

ligation between the parties" under the credit contract. *Id.* § 226.5(c) (2004).

The second provision concerns "[c]hange[s] in terms." 12 C.F.R. § 226.9(c) (2004). During the relevant period, this provision mandated that "[w]henever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected." *Id.* § 226.9(c)(1). Section 226.9(c) disclosures—triggered only when there was a *change* in one or more of the terms that § 226.6 required creditors to disclose initially—effectively operated as a new round of "initial disclosures" for the changed term. Thus, notice of a change in terms was not required for rate increases provided for in the cardholder's "[i]nitial" terms, such as application of a new rate for failing to maintain a certain account balance. In contrast, a change-in-terms notice was required if the card issuer invoked a reservation-of-rights provision to *amend the contract* to adopt a rate term different from the existing contract terms. As the Commentary explained:

> No notice of a change in terms need be given if the specific change is set forth initially, such as: rate increases under a properly disclosed variable-rate plan ... or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an

> increase may occur under the creditor's contract reservation right to increase the periodic rate).

12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1 (hereafter Comment 9(c)-1).

Ordinarily, when Regulation Z required the creditor to send notice of a change in terms, the creditor had to send it 15 days in advance of the effective date of the change. 12 C.F.R. § 226.9(c)(1) (2004).[2] If, however, the creditor changed the rate terms of the agreement because of a cardholder's default or delinquency, then the 15-day period was inapplicable and the creditor needed only to send the notice before the effective date of the change. *Id.* Thus, in the event of a default, if the bank were to *amend* the cardholder agreement to provide for a rate not already authorized by that agreement, notice was required but the creditor did not have to send it 15 days in advance. As the Commentary stated:

> *3. Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change— ... [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)(1)-3 (hereafter Comment ¶ 9(c)(1)-3).

Credit card issuers' initial disclosures—and, for that matter, any change-in-terms disclosure—do not

---

[2] Under recent amendments to the regulation, that time is now 45 days. *See infra* pp. 12-13.

necessarily identify the particular rates that will be applicable to a card account at a particular time. As discussed, Regulation Z required these disclosures to identify all rates that "may" apply under the terms of the parties' agreement, whereas the rate that does apply in any instance may depend on which credit features a cardholder utilizes, cardholder behavior, external events (*e.g.*, the movement of a variable-rate index), or other circumstances. Under Regulation Z, ongoing disclosure to the cardholder of which rates are being applied to the account was (and is) conveyed by "[p]eriodic statements," typically rendered monthly. 12 C.F.R. § 226.7(d) (2004). The periodic statement identifies transactions on the account and discloses each rate "in effect during the billing cycle reflected on the periodic statement." *Id.* pt. 226, supp. I, cmt. ¶ 7(d)-2.

C. Recent Revisions To Regulation Z

This case is governed by the provisions of Regulation Z described above. Last year, the Federal Reserve Board revised the regulation twice, first to implement changes in its regulatory policy, and later to reflect changes enacted by Congress. Unlike the provisions in place at the time of the events of this case, Regulation Z now requires advance notice when a card issuer is implementing an increased periodic rate pursuant to a default-rate term, even where the term was included with a card issuer's initial disclosures.

The first change to Regulation Z, reflecting a change in Board policy, was initiated through a rulemaking process begun in late 2004. Repeatedly during that process, the Board stated—in discussing the version of Regulation Z applicable here—that the Regulation authorized the implementation of a contractual de-

fault-rate term without a change-in-terms notice. In 2007, for instance, the Board stated:

> [N]o change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 72 Fed. Reg. 32,948, 33,009 (June 14, 2007) (proposed rule); *accord Truth in Lending*, 69 Fed. Reg. 70,925, 70,931-70,932 (Dec. 8, 2004) (advance notice of proposed rulemaking (ANPR)).

The Board explained that it was changing its policy on this point out of concern that some cardholders—notwithstanding the notice that they had previously received—were not aware that by defaulting they could incur certain penalty rates. *See, e.g.*, *Truth in Lending*, 72 Fed. Reg. at 32,957, 33,012. The Board thus added a new paragraph (g) to § 226.9 that requires 45 days' advance notice when a cardholder's interest rate is increased because of a default and the increase is pursuant to a previously disclosed contract term. *See Truth in Lending*, 74 Fed. Reg. at 5,414. The Board also amended § 226.9(c) to increase, from 15 days to 45 days, the advance notice that cardholders must receive when actual changes in terms are made on their accounts, in-

cluding changes concerning penalty or other interest rates. *See id.* at 5,413.

Before the Board's amended regulation took effect, Congress passed the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act"), which requires 45 days' advance notice for most credit card interest-rate increases, regardless of whether an increase reflects a change in contract terms or an implementation of existing terms. Pub. L. No. 111-24, § 101(a), (b) 123 Stat. 1734, 1735 (2009). In July 2009, the Board adopted new regulations to implement the CARD Act, but retained separate provisions, as in the January 2009 rule, applicable to (1) changes in rate terms and (2) implementations of previously disclosed default-rate terms. *See Truth in Lending*, 74 Fed. Reg. 36,077, 36,094-36,096 (July 22, 2009) (interim final rule) (promulgating new versions of 12 C.F.R. § 226.9(c), (g), effective August 20, 2009).

The regulatory amendments discussed in this section do not apply to this case.

D. Proceedings Below

Respondent's complaint. Respondent James McCoy filed this putative class action in California state court to challenge petitioner Chase Bank USA's practice of increasing a cardholder's interest rate following a default without providing notice of a change in terms under § 226.9(c). The cardholder agreement governing McCoy's account with Chase provided that his entitlement to "Preferred" rates was contingent on his avoiding specified events of default. Pet. App. 20a-21a n.1 (Cudahy, J., dissenting). In the event of such a default, Chase was authorized to impose different rates "up to the maximum Non-Preferred rate described in the

Pricing Schedule." Pet. App. 20a n.1 (Cudahy, J., dissenting).

Following McCoy's default, Chase increased his interest rate in accordance with the contract. Pet. App. 2a. McCoy's complaint alleged that Chase had violated Regulation Z by "'failing to notify its customers of increases in interest rates on or before the effective date of the change.'" Pet. App. 41a (citing the Second Amended Complaint).

The district court decision. Chase removed the action to the United States District Court for the Central District of California and sought dismissal of the complaint. Pet. App. 37a. Chase contended that McCoy's rate increase constituted an implementation of—not a change to—the contractual terms governing the account and set forth in Chase's initial disclosures, and that the Commentary to Regulation Z specifically provided that "[n]o notice of a change in terms need be given if the specific change is set forth initially," Comment ¶ 9(c)-1.

The district court granted Chase's motion, agreeing with every other court to have considered the TILA issue in concluding that no change-in-terms notice was required in connection with "the implementation of terms [that had previously been] explicitly disclosed." Pet. App. 42a; *see also* Pet. 22 n.4; Pet. App. 40a-41a (citing similar decisions). McCoy appealed.

The Ninth Circuit decision. Before the Ninth Circuit decided the appeal in this case, it confronted another case involving the same issue, brought by the same counsel, also against Chase, based on a virtually identical cardholder agreement—*Evans* v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008). The *Evans* panel rejected the § 226.9(c) claim unanimously,

holding that Regulation Z did not require sending "change-in-terms notices prior to implementing discretionary interest rate increases after default." *Id.* at 693.

Approximately one year later, having stayed this case pending decision in *Evans*, a different panel of the Ninth Circuit rejected the *Evans* decision and reached a contrary result. *See* Pet. App. 12a-14a. Judge Cudahy, sitting by designation from the Seventh Circuit, dissented. Pet. App. 19a-33a.

The panel majority concluded that the "text of Regulation Z is ambiguous" and turned to the Board's Official Staff Commentary. Pet. App. 4a. Among the Commentary's provisions pertinent to § 226.9(c), the majority found Comment 9(c)(1)-3, the "[t]iming" comment, to be "the most salient," holding that the comment's "plain-meaning ... is to require notice when a cardholder's interest rates increase because of a default." Pet. App. 4a. The majority disagreed that Comment 9(c)-1, which states that "[n]o notice of a change in terms need be given if the specific change is set forth initially," was relevant to rate increases based on default or delinquency, even implementation of a default-rate term. *See* Pet. App. 5a. The majority went on to state that even if Comment 9(c)-1 were relevant, the various examples in that comment show that rate increases are excluded from its scope if the card issuer retains some discretion not to impose the increase. *See* Pet. App. 6a-9a.

In reaching its conclusions, the panel majority rejected the view of the *Evans* panel and every district court to have confronted the same question. Pet. App. 11a-12a. The majority also declined to defer to the Board's explanations of Regulation Z in the recent rulemaking proceeding, on the ground that they were

"tersely worded 'interpretations' of existing law [that were] incidental to the purpose of the agency action, ... stated in conclusory fashion, ... themselves ambiguous, and have now been superceded." Pet. App. 13a n.14.[3]

In dissent, Judge Cudahy criticized the majority for failing to defer to the Board's clear explanation of § 226.9(c) in its rulemaking, and concluded that under this Court's precedent the Board's opinion regarding the correct interpretation of Regulation Z is entitled to deference, "even if that opinion appears in an ANPR rather than Official Staff Commentary." Pet. App. 27a.

Chase petitioned for panel rehearing and rehearing en banc, noting that days after the panel decision the Seventh Circuit had issued a decision reaching the opposite result. *See Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied with op.*, 563 F.3d 634 (7th Cir. 2009). The Ninth Circuit denied the petition. Pet. App. 49a-50a.

E. The Board's Amicus Brief In *Shaner*

In seeking rehearing en banc, Chase urged the Ninth Circuit to invite the Board to express its views on the question presented. The court did not do so. The First Circuit, however, which had a similar appeal pending, did solicit such a brief. *See* Order 1-2, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. Aug. 4, 2009). The Board accepted the invitation and filed a brief explaining that it had long construed Regulation Z as Chase and other card issuers did:

---

[3] Due to an error in preparing the Petition Appendix, footnote 14 in the Appendix is footnote 5 in the official version of the Ninth Circuit's decision.

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Brief for the Board of Governors of the Federal Reserve System as *Amicus Curiae* at the Request of the Court at 1, *Shaner* (Oct. 22, 2009) (hereafter Board Br.).[4] "In the Board's view, a rate increase under these circumstances was not considered a 'change in terms,' but rather was considered the implementation of terms already disclosed in the initial disclosures." *Id.* at 5.

Deferring to the views expressed in the Board's amicus brief, the First Circuit affirmed the dismissal of the TILA claim in that case, which was substantively

---

[4] The Board's brief is available through the First Circuit's online docket sheet for *Shaner* (*i.e.*, PACER) but not on LEXIS or Westlaw. Chase has therefore submitted a letter seeking permission to lodge the brief with the Court.

identical to McCoy's. *See Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488, 493 (1st Cir. 2009). The court explained that it had solicited the brief from the Board "to supply the Board's view of its own regulations and as such it is entitled to due respect as the agency's 'fair and considered judgment on the matter in question,' which happens to be the agency's own regulation." *Id.* (quoting *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)).

SUMMARY OF ARGUMENT

I. The question presented here is whether, in the circumstances of this case, the applicable version of Regulation Z required Chase (and other card issuers) to provide McCoy (and other cardholders) with a change-in-terms notice. The Federal Reserve Board's amicus brief in *Shaner*, filed at the invitation of the First Circuit, provides an unmistakably clear answer. The Board does not, and did not, interpret Regulation Z to require notice of a change in terms in the circumstances here. The Board, the brief explains, interpreted interest-rate increases like those at issue here to constitute an implementation of terms rather than a change in terms. The Solicitor General's petition-stage brief in this case, filed at this Court's invitation, provides the same clear answer. The two briefs discuss the bases for the Board's views, and address several errors that led the panel majority in this case to its contrary interpretation of the regulation. These include the majority's misreading of Comments 9(c)-1 and 9(c)(1)-3, and its mistaken view that the analysis here depends partly on whether the card issuer had discretion regarding the imposition of default-based rate increases. The two briefs also emphasize that the interpretation of Regulation Z offered therein is one that the Board has held consistently for years.

Under this Court's case law, the views expressed in these briefs warrant substantial judicial deference. This Court has instructed that an agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted). The Court has also specifically directed courts to give great deference to the Board's interpretations of Regulation Z, because TILA delegates interpretive authority to the Board and because the subject matter is technical and complicated. Only when a Board interpretation is "irrational" can a court properly decline to defer to it. *Ford Motor Credit*, 444 U.S. at 568. The standards for deference are satisfied here. The Board's interpretation in this case is correct and consistent both with the principles on which the underlying credit card contract are based and with TILA's consumer-protection goals. The Board's view also properly focuses on the substance of the relevant transactions rather than their form. That the Board's views were most recently expressed in legal briefs does not diminish the level of deference that those views are to receive.

II. The Ninth Circuit's decision—which departs from that of every other court to address this issue—is erroneous even without consideration of the two amicus briefs. The panel majority's ruling is inconsistent with the text of the relevant provisions of both Regulation Z and the Official Staff Commentary. Those provisions make clear that notice of a change in terms was required, as the name suggests, only when there was in fact a change to one or more of the initially disclosed terms, rather than when there was simply an implementation of those terms. Far from refuting Chase's position, as the panel majority concluded, the illustra-

tive examples included in the Commentary support that position.

The panel majority also went astray in failing to defer to statements the Board made during the rule-making proceedings, statements that clearly explain that the applicable version of the regulation did not require a change-in-terms notice for interest-rate increases like those at issue here. The panel majority dismissed these statements as "incidental," when in fact they were an integral part of the process for revising the rule. The majority also labeled the statements "terse," even though they were more specific and detailed than the relevant provisions of the regulation itself and the Commentary. And while the panel majority saw ambiguity in the statements, they were in reality entirely clear. More generally, the panel majority failed to recognize that if its interpretation were correct, then a critical component of the years-long rule-making process was entirely unnecessary. In failing to defer to the Board's statements, the panel majority failed to appreciate the extent to which issuers require a clear and consistently applied body of rules regarding the meaning of Regulation Z. Congress has expressly directed that the Board, not the courts, provide and interpret that body of rules in the first instance. The decision below is inconsistent with that legislative command.

ARGUMENT

I. THE FEDERAL RESERVE BOARD'S AMICUS BRIEF IN *SHANER* PROVIDES A CLEAR—AND CONTROLLING—ANSWER TO THE QUESTION PRESENTED, AS DOES THE SOLICITOR GENERAL'S INVITATION BRIEF HERE

McCoy's claim is that, notwithstanding the notice he received in the initial disclosures that certain de-

faults could lead to higher interest rates, TILA and Regulation Z required Chase to provide him with notice of a change in terms before implementing such increases. The Board's amicus brief in *Shaner* expressly rejects that view of Regulation Z. The invitation brief filed in this case by the Solicitor General reiterates that position. Granting appropriate deference to the views in these briefs leaves no doubt that the Ninth Circuit's judgment should be reversed.

A. The Amicus Briefs Unambiguously State That Regulation Z Did Not Require Provision Of A Change-In-Terms Notice Here

The question in this case is whether the applicable version of Regulation Z required Chase to send McCoy notice of a *change* in terms when it *implemented* the initially disclosed default-rate term in his cardholder agreement—a term that specified both the events of default that could lead to an increased rate and the maximum possible rate that could result. The Board's amicus brief in *Shaner* clearly states that the Board's answer to that question is "no." The brief explains (at 1) that the Board "has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement." The Board considers such a rate increase to be "the implementation of terms already disclosed in the initial disclosures," and not "a 'change in terms.'" *Id.* at 5.

The Solicitor General's invitation brief in this case makes the same point. It states (at 10) that "[a]t the time of the transactions at issue in this case, Regulation

Z did not require credit card issuers to provide cardholders with a change-of-terms notice before implementing a default-rate provision contained in the preexisting credit card account agreements." "[A]ny resulting rate increase," the brief adds, "did not represent a 'change in terms,' but rather the implementation of terms already set forth in the initial disclosure statement." *Id.* at 12.

The Board's amicus brief in *Shaner* also makes clear that the answer to the question presented is the same even if, as here, the issuer retains discretion not to impose any penalty rate or to impose one below the specified maximum. *See* Board Br. 15 ("The Board ... interprets Regulation Z (prior to the 2009 amendments) to provide that no change-in-terms notice is required where a creditor exercises discretion to impose less than the full disclosed penalty rate or no penalty rate at all when a contingency set forth in the contract occurs."). And here again, the Solicitor General's invitation brief (at 15-16) reiterates the point.

The two briefs go on to correct several errors that underlay the Ninth Circuit's ruling. Initially, both briefs address the panel majority's erroneous view of Comment 9(c)(1)-3, which the court referred to as Comment 3 and which addresses the "[t]iming" of any "[w]ritten [n]otice [r]equired" by § 226.9(c)(1). The majority placed dispositive weight on that comment, concluding that it "require[s] notice when a cardholder's interest rates increase because of a default." Pet. App. 4a; *see also* Pet. App. 5a ("Comment 3[] ... is directly on point and therefore governs."). The Board's brief explains why that view is mistaken. Comment 9(c)(1)-3 "relates only to the *timing* of subsequent disclosures in those circumstances where section 226.9(c)(1) of the regulation already requires that subsequent disclosures

be made; it does not create a substantive requirement to provide disclosures where the regulation and commentary do not already demand them." Board Br. 14 (emphasis added). The Solicitor General's brief repeats this critical distinction, stating (at 14) that "[r]ather than establishing a freestanding disclosure requirement, Comment 9(c)(1)-3 specified the time at which such disclosures must be made."

The amicus briefs thus confirm that Comment 9(c)(1)-3 had no application when a credit card issuer implemented an initially disclosed term. The comment applied, instead, only where Regulation Z already required provision of a change-in-terms notice. For example, the comment would have applied when, in response to a cardholder's default, a creditor "change[d] the actual terms of the underlying card agreement to impose a penalty rate ... when the agreement did not specify a penalty rate." Board Br. 5. In such circumstances, the timing rule of Comment 9(c)(1)-3 would have specified that the issuer need not provide the required change-in-terms notice 15 days in advance of such a change, but instead may mail or deliver it "as late as the effective date of the change."

The amicus briefs also reject the panel majority's view of Comment 9(c)-1, which provides that no notice of a change in terms is required for "[c]hanges initially disclosed." The majority below considered Comment 9(c)-1 inapplicable, both because it thought Comment 9(c)(1)-3 governed more specifically, *see* Pet. App. 5a, and because it read Comment 9(c)-1 as inapposite where the creditor retained discretion not to impose the initially disclosed rate increase, or to impose a rate below the disclosed maximum, *see* Pet. App. 6a-9a.

The Board's amicus brief dispels those misunderstandings. It first explains (at 14) that Comment 9(c)-1, and not Comment 9(c)(1)-3, governs in the circumstances here because Comment 9(c)-1 "provides the Board's official interpretation of the entirety of section [226.]9(c), relating to subsequent disclosures of changes in terms." The Board's brief (at 15) also rejects the panel majority's interpretation of Comment 9(c)-1 as excepting rate-increase provisions that leave the creditor some discretion not to make the rate change in question, or to do so to a lesser extent. The Board was "aware that credit card companies frequently choose to impose less than the maximum rate increase permitted under the contract terms, and has never viewed that exercise of discretion in the consumer's favor to require a change-in-terms notice where none would have been required had the full increase been immediately imposed." Board Br. 15 (footnote omitted); *accord* U.S. Pet.-Stage Br. 15. As for the examples in Comment 9(c)-1, from which the panel majority derived its restrictive view, the Board's brief explains (at 16 n.8) that they "are illustrative only, and the Board did not mean ... to limit the circumstances for the absence of a change-in-terms notice to those" examples. *See also id.* at 5 ("The Board has never stated that the examples listed in this paragraph ... are exhaustive.").

The Board's interpretation set forth in the two briefs reflects a considered, long-held view. *See* Board Br. 6-10; U.S. Pet.-Stage Br. 3-6, 16-17. As the briefs explain, that position was confirmed by statements the Board made during the rulemaking proceedings. *See, e.g.*, Board Br. 9-10 ("These statements by the Board clearly indicate the Board's understanding that Regulation Z, ... prior to the 2009 amendments, *did* 'permit immediate application of penalty pricing upon the oc-

currence' of 'events specified in the contract.' In fact, it was the absence of any notice requirement in this circumstance that led the Board to propose the amendment to Regulation Z[.]" (quoting *Truth in Lending*, 72 Fed. Reg. at 33,012)). The briefs also point to additional supporting evidence from the rulemaking proceedings—specifically the fact that the Board twice categorized the creation of a notice requirement in the circumstances here as a "major proposed change," and the fact that the Board effected that change by adding an entirely new paragraph (g) to section 226.9. *See id.* at 8, 10-12; U.S. Pet.-Stage Br. 13.

B. Under This Court's Precedent, The Views Expressed By The Board Warrant Great Deference

The views expressed in the Board's amicus brief and the Solicitor General's invitation brief should be dispositive here. This Court has instructed—often unanimously—that an agency's interpretation of its own regulation is "controlling" unless the interpretation is "'"plainly erroneous or inconsistent with the regulation."'" *Auer*, 519 U.S. at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting, in turn, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); *see also Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 & n.7 (2009) (unanimously reaffirming and applying *Auer*); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 168-171 (2007) (same). "This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded

in policy concerns.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

These principles have been considered especially important in the TILA and Regulation Z context, not only because the subject matter is highly complex but also because TILA itself delegates expansive interpretive authority to the Board. *See, e.g., Ford Motor Credit*, 444 U.S. at 568 (TILA's "legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation."); *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973) ("Congress determined to lay the structure of the Act broadly, and to entrust its construction to an agency with the necessary experience and resources to monitor its operation."). This Court thus has cautioned that "judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational," and that "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive." *Ford Motor Credit*, 444 U.S. at 565, 568.

The views expressed in the two briefs easily satisfy these standards for deference. The briefs were submitted pursuant to judicial invitation to explain the regulation and Commentary in the Board's role as neutral expositor of its own regulatory actions, and not as a party with a litigant's stake in the outcome. As explained below, moreover, the position taken in the amicus briefs is demonstrably correct. Notably, every other court to consider the question presented has embraced the Board's views, most even without the benefit of the Board's amicus brief. At a bare minimum, the Board's

position is a reasonable construction of the regulatory text (which the panel majority considered "ambiguous," Pet. App. 4a). The Board's construction is certainly neither "plainly erroneous [n]or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Not even the panel majority took that position.

Nor is there anything "irrational" about the Board's interpretation. *Ford Motor Credit*, 444 U.S. at 568. To the contrary, the Board was correct to construe its regulation not to require a creditor to send notice of a change in terms when the creditor was implementing, rather than changing, the initially disclosed rate term. That construction is consistent with how a credit card contract works, and with the Board's reference to such contracts as a basis for disclosure. Regulation Z requires disclosures to "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c) (2004). Implementation of a default-rate term does not change any "terms of the legal obligation between the parties" in effect at the time of the initial disclosures.

The Board's interpretation is also consistent with TILA's consumer-protection goals. It avoided imposing an additional burden on creditors that chose to help defaulting cardholders by not automatically increasing their rate to the permissible maximum. Even McCoy and the panel majority appeared to agree that the pre-amendment version of Regulation Z did not require provision of a change-in-terms notice if the initial disclosures specified the exact rate that would result from a particular default and left the issuer no discretion to impose a smaller increase (or no increase at all). *See* Pet. App. 6a-7a. Thus, where an issuer retained discretion to help cardholders by imposing a less-than-maximum penalty rate, or no penalty rate, in response

to a default, the majority's reading would have imposed a burden, in the form of an additional notice requirement, on the issuer. Issuers routinely exercise their discretion to excuse such defaults, to accommodate a cardholder's hardship or emergency, for example, or because of a cardholder's historic creditworthiness. *See* Board Br. 15. The panel majority's approach would have discouraged such lenity. The Board's rejection of that approach was thus in keeping with TILA's consumer-protection goals. *See* Pet. App. 32a-33a (Cudahy, J., dissenting); *see also* Brief of Amicus Curiae Robert A. Glen, Delaware State Banking Commissioner, In Support of the Appellee's Petition for Panel Rehearing and Rehearing *En Banc* and Supporting Affirmance at 10, *McCoy* v. *Chase Manhattan Bank, USA, N.A.*, No. 06-56278 (9th Cir. May 6, 2009) ("Discretion benefits consumers by permitting accommodations[.]"); *id.* at 13.

The Board's position is also rational because the contrary view, adopted by the panel majority, would elevate form over substance. As noted, there should be no dispute that Regulation Z did not previously require notice of a change in terms for a non-discretionary rate increase to the penalty rate disclosed in advance. And no notice of a change in terms is required when an issuer *lowers* a cardholder's interest rate. *See* 12 C.F.R. § 226.9(c)(2) (2004) ("No notice under this section is required when the change involves ... a reduction of any component of a finance or other charge[.]"). As a result, no notice would have been required where a non-discretionary penalty rate was triggered by a default, but the issuer then lowered the cardholder's rate as a matter of discretion. As the district court observed, that is no different in substance than the situation here.

See Pet. App. 43a-44a n.26; *cf. also Swanson*, 559 F.3d at 655, 656.[5] The Board's decision to interpret its regulation as applying the same notice requirement to two substantively identical situations was rational, not demonstrably irrational.

That the Board most recently presented its views in a legal brief does not affect the deference due to those views. As the panel majority recognized, *see* Pet. App. 13a n.14, in *Auer* this Court unanimously deferred to agency views that were similarly presented in a brief, after noting that those views were "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," 519 U.S. at 462 (alteration in original) (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *see also Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 244 (2004) (relying, in interpreting Regulation Z, on the Board's amicus brief in the court of appeals). The same is true here: McCoy does not challenge any agency action, nor is there any reason to question whether the Board's views "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462, *quoted in Kennedy*, 129 S. Ct. at 872 n.7, *and Long Island Care*, 551 U.S. at 171. Indeed, the views set forth in the Board's and the Solicitor General's briefs follow from, and are consistent with, those the Board had repeatedly expressed over several years in the rulemaking proceedings. *Cf. Kennedy*, 129 S. Ct. at 872 n.7 (deferring to agency's interpretation of its own regulation even when (unlike here) "the Government's position ... has fluctuated").

---

[5] Footnote 26 in the Petition Appendix is footnote 4 in the LEXIS version of the district court's opinion.

II. The Ninth Circuit's Decision Is Erroneous Even Without Regard To The Amicus Briefs

The amicus briefs' clear answer to the question presented should suffice to resolve this case. The decision below, however, would be erroneous even if the amicus briefs had never been solicited.

A. The Majority Below Misunderstood The Regulation And Accompanying Official Staff Commentary

The panel majority misunderstood the regulatory provisions at issue, which required notice of a change in terms when the parties' contract obligations were changed, not when they were implemented in accordance with the initially disclosed terms. As discussed, § 226.9(c) required a change-in-terms notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1) (2004). Section 226.6 required initial disclosure of "each periodic rate that may be used to compute the finance charge." *Id.* § 226.6(a)(2). For example, it required initial disclosure of default rates that *could* be applied to the account, including rates not presently (or possibly ever) actually applied to account balances. *See id.* cmt. ¶ 6(a)(2)-11. When circumstances varied—for example, the cardholder defaulted—implementation of the default-rate terms that were "initially disclosed" under § 226.6(a)(2) could lead to use of an increased rate, but that would occur without any change to the initially disclosed rate terms governing the account. There was accordingly no "change in terms" to disclose. Nothing in § 226.9(c) stated that a new disclosure notice was due when "term[s] required to be disclosed under § 226.6" were implemented in accordance with the initial disclosures of the parties' agreement.

The key Commentary provision addressing change-in-terms notices states that "[n]o notice of a change in terms need be given if the specific change is set forth initially"—that is, in the initial disclosures. Comment ¶ 9(c)-1. Chase did set forth its default-rate terms initially, as the Commentary envisions. The cardholder agreement "disclose[d] the specific event or events" of default "that may result in the increased rate," and also disclosed the specific "increased penalty rate that may apply" in the event of such defaults. 12 C.F.R. pt. 226, supp. I, cmt. ¶ 6(a)(2)-11; *see* Pet. App. 20a-21a n.1 (Cudahy, J., dissenting). The Commentary provides, as an illustrative example, that no change-in-terms notice is required for "an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." Comment ¶ 9(c)-1. Similarly here, where an increase occurs because the consumer has been under an agreement to pay on time in order to keep what Chase refers to as "Preferred Rates," and the consumer fails to do so, no change-in-terms notice is required because both the default and the applicable penalty rates have been "set forth initially."[6]

The panel majority's holding was, for these reasons, contrary to the text of the regulation and Com-

---

[6] The panel majority concluded that Chase's default-rate term was "like" a general reservation of rights to amend the cardholder agreement, in the sense that Chase retained a certain degree of discretion to charge *less* than the rate specified by the agreement. Pet. App. 8a-9a. But Chase's default-rate term was nothing like a general reservation of an unbounded power to *increase* rates. It limited the application of default rates to specific circumstances, and specified the maximum default rate that could be applied.

mentary that prescribes when change-in-terms notifications are required. Comment ¶ 9(c)(1)-3, on which the panel majority relied for its contrary conclusion, *see* Pet. App. 4a-5a, is off point: As discussed, it addresses only the timing of a change-in-terms notice, if one is otherwise required.

B. The Panel Majority Improperly Rejected The Board's Federal Register Statements That A Change-In-Terms Notice Was Not Required For The Implementation Of Default Rates

The panel majority wrongly refused to defer to the Board's statements, during the rulemaking proceedings, regarding what Regulation Z then required in the circumstances of this case. The Board's statements addressed the precise issue in controversy here, explaining that, under existing regulatory requirements, a card issuer "need not provide a change in terms notice" upon the implementation of a default rate "[b]ecause the circumstances of the increase are specified in advance in the account agreement." *Truth in Lending*, 72 Fed. Reg. at 33,009. The majority below gave no weight to those interpretations, stating that courts "defer to the FRB's Official Staff Commentary, not incidental descriptions of current law contained in an ANPR." Pet. App. 13a n.14.[7] The refusal to defer to the Board's officially published interpretation of its own regulatory requirements was an unwarranted departure from established principles of deference.

---

[7] Throughout its opinion, the panel mistakenly referred to the 2007 proposed rule as an advance notice of proposed rulemaking. *See, e.g.*, Pet. App. 10a.

The panel majority identified no valid justification for its refusal to respect the Board's interpretation of its own regulation. The majority did not contend that the Board's interpretation was inconsistent with the regulation. The opinion characterizes the Board's statements as "incidental" and "tersely worded" (Pet. App. 13a n.14), but those characterizations were misaimed. The Board's interpretive statements, quoted above, were explicit, directly on point, and more extensive, focused, and definitive in addressing the issue than the Official Staff Commentary itself. Nor did the Ninth Circuit have any reason to suspect, despite an insinuation that it did (*see id.*), that the Board's repeatedly stated interpretation of § 226.9(c) failed to represent the agency's "considered" views, *Auer*, 519 U.S. at 462. To the contrary, the Board's interpretations were issued as explanations, repeated over several years, in formal notice-and-comment rulemaking preambles published in the Federal Register, and specifically advanced by the Board as a significant part of the required justification for its decision to adopt the new § 226.9(g).[8]

There is nothing ambiguous about the Board's statement that under § 226.9(c) "no change-in-terms is required" when a card issuer raises the applicable rates based on default rate "agreements [that] permit the

---

[8] Providing such an explanation was an appropriate and necessary aspect of the Board's rulemaking. When an agency is changing a previously announced rule, "the requirement that an agency provide reasoned explanation for its action ... ordinarily demand[s] that it display awareness that it *is* changing position .... And of course the agency must show that there are good reasons for the new policy." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

card issuer to increase the periodic rate if the cardholder makes a late payment." *Truth in Lending*, 72 Fed. Reg. at 33,009. The Board's words, and its reasoning that it would need to add new § 226.9(g) if it chose to impose a disclosure obligation for implementation of a disclosed default rate, are, as Judge Cudahy put it, "more than clear." Pet. App. 27a.[9]

The panel majority cited a different passage from the same Federal Register notice, but that passage is neither ambiguity-creating nor inconsistent with the language above. *See* Pet. App. 10a-11a. The cited passage stated that the Board proposed to:

> [A]dd § 226.9(g)(1) to require creditors to provide 45 days advance notice when a rate is increased due to a consumer's delinquency or default, or if a rate is increased as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit. This

---

[9] Discussing language from the same passage of the proposed rule (language quoted *supra* p. 12), the panel majority stated that "the term 'change-in-terms notice' could, as Chase argues, refer to contemporaneous notice required for changes in interest rates, but might instead refer only to the fifteen days' advance notice required for changes in contractual terms." Pet. App. 10a. That suggestion fails for two reasons. First, the majority's attempt to limit the definition of "change-in-terms notice" to 15 days' advance notice is refuted by Comment 9(c)(1)-3, which uses that term in describing a situation in which less than 15 days' advance notice is permitted. *See supra* p. 10 (quoting the comment). Second, the court's suggestion ignores the last portion of the quoted language, which makes clear that pre-effective-date notice was *not* required, stating that instead "the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Truth in Lending*, 72 Fed. Reg. at 33,009.

> notice would be required even if, *as is currently the case*, the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures.

Truth in Lending, 72 Fed. Reg. at 33,012 (emphasis added). The panel conceived that the phrase "currently the case" in this passage could be a reference to extant disclosure requirements under § 226.9(c). But that is plainly wrong: The passage is explicit that it is discussing the proposed § 226.9(g), and "currently the case" refers to the industry practice of including a default-rate provision in cardholder agreements and initial disclosures, *not* regulatory requirements under § 226.9(c).

The court of appeals also was wrong in stating that the ANPR and proposed rule have been "superceded" by the final rule. Pet. App. 9a n.11.[10] Nothing in the final rule—which enacted the changes as proposed in 2007, with only minor amendments—offers a different interpretation of the pre-amendment regulation's change-in-terms notice requirements. To the contrary, the final rule's statements in this regard are fully consistent with those in the ANPR and the proposed rule. *See, e.g.*, *Truth-in-Lending*, 74 Fed. Reg. at 5,253-5,254. To the extent a final rule could ever supersede an ANPR or a proposed rule, it surely could do so only to the extent that it contradicted the earlier publications. That did not occur here.

Further undermining the panel majority's interpretation is the fact that it would render a central part

---

[10] Footnote 11 in the Petition Appendix is footnote 2 in the official version of the Ninth Circuit's decision.

of the Board's rulemaking process superfluous. Were that interpretation correct, then the Board's addition of paragraph (g) to § 226.9 was entirely unnecessary. Regulation Z already would have required advance notice under the circumstances covered by the new paragraph (g)—*i.e.*, rate increases "as a penalty for one or more events specified in the account agreement, such as making a late payment." 12 C.F.R. § 226.9(g)(ii) (2010). This Court has previously relied on similar circumstances to support its conclusion regarding the meaning of an agency regulation. *See Bowles*, 325 U.S. at 418 n.9 ("Indeed, the fact that the Administrator found it necessary to make such amendments is some evidence that ... the rules here in issue" had a different meaning than the post-amendment rules.). The Ninth Circuit erred in not "taking the Board at its word that § 226.9(g) makes a real change." *Swanson*, 559 F.3d at 657; *see also id.* ("Swanson effectively wants the benefit of tomorrow's regulations, today.").[11]

---

[11] Relatedly, the Board's proposed rule stated that "[t]he Board received over 200 comment letters in response to the December 2004 ANPR," including over 100 from "individual consumers" and "about 20 ... from consumer advocates." *Truth in Lending*, 72 Fed. Reg. at 32,949. The proposed rule then discussed the substance of these comments—without giving any indication that even a single one challenged the ANPR's statements regarding the lack of a change-in-terms notice requirement under the circumstances of this case. *See id.* at 32,950. Much the same occurred in the final rule. Indeed, there the Board stated that the consumers and consumer groups affirmatively acknowledged that the new disclosure requirement represented a change. *See Truth in Lending*, 74 Fed. Reg. at 5,351 ("Consumers and consumer groups were supportive of the proposal's requirement to give 45 days' advance notice of the imposition of a penalty rate, noting that the proposal represented a *substantial improvement over the current rule.*" (emphasis added)). Were the panel majority's view of § 226.9(c)

The Board's ability to render authoritative interpretations of its regulations is an adjunct of its delegated authority to promulgate those regulations. *See Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." (citing *Ford Motor Credit*, 444 U.S. at 566, 568)). Where an agency has interpreted its regulation, a court's responsibility is not to decide *de novo* "which among several competing interpretations best serves the regulatory purpose," but rather to defer to the agency save in extreme circumstances. *Thomas Jefferson Univ.*, 512 U.S. at 512 (citing *Bowles*, 325 U.S. at 414). In TILA cases specifically, this Court has accorded weight to a proposed interpretation of Regulation Z and comments made by the Board in Federal Register preambles in interpreting statutory terms. *See Anderson Bros. Ford*, 452 U.S. at 212-213, 217.

Whether or not the Ninth Circuit agreed with the Board's pre-2009 policy choices, it was obligated to defer to them. *See Ford Motor Credit*, 444 U.S. at 567-569. Its refusal to do so seriously undermines the Board's role and creditors' ability to rely on the Board's pronouncements. Card issuers and other creditors depend on every piece of published guidance from the Board because, in order to lend, they must make the

---

correct, the comments received by the Board surely would have included some suggestion that the proposed change was in fact unnecessary.

necessary disclosures, and in order to make those disclosures they must have "a coherent and predictable body of technical rules" on which to rely. *Id.* at 568 n.12. It is the prerogative of the Board (and Congress) to change Regulation Z based on evolving policy judgments. That is precisely what happened in the 2009 statutory and regulatory amendments. But it is not appropriate for the courts to mandate such changes by retrospectively interpreting the regulation to conflict with the Board's definitive interpretations. *See id.* at 568 ("[J]udges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational."). That is what the court of appeals did here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

AUGUST 2010

RESPONDENT'S BRIEF

FILED
OCT 18 2010
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, individually and on behalf of others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF

BARRY L. KRAMER
12428 Promontory Road
Los Angeles, CA 90049
(310) 440-9761

GREGORY A. BECK
Counsel of Record
DEEPAK GUPTA
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
gbeck@citizen.org

Counsel for Respondent

October 2010

QUESTION PRESENTED

Where a creditor reserves discretion to increase a cardholder's interest rate up to a stated maximum rate in the event of default, does the Truth in Lending Act (TILA), as implemented by the applicable version of Regulation Z, require the creditor to notify the cardholder when it chooses to increase the cardholder's rate, and to disclose the new rate it has chosen to apply?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

A. Regulation Z's Disclosure Requirements 2

B. Recent Amendments to Regulation Z 4

C. Chase's Disclosure Practices and the Proceedings Below 7

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. Regulation Z Requires Chase to Inform Cardholders When It Increases Their APR. 13

A. Regulation Z's Plain Language Provides That Notice of an Increased APR Due to Default "Shall Be Given ... Before the Effective Date of the Change." 13

B. Chase's Contractual Reservation of Rights Was Not a "Term Required to Be Disclosed Under § 226.6." 15

C. Chase's Interpretation of Regulation Z Would Eviscerate Its Primary Purposes of Protecting Consumers and Facilitating Accurate Comparison of Loans. 19

II. The Board's Past Interpretations of Regulation Z Strongly Support the Conclusion that the Regulation Requires Disclosure of Increases in a Loan's APR 23

A. The Official Staff Commentary, Like Regulation Z, Expressly Requires Disclosure of Increased APR Due to Default 23

B. The Board Staff's Statements During Rulemaking Proceedings, Although Not Representing the Staff's Official Views, Also Support § 226.9(c)'s Express Notice Requirement 30

III. The Views of Agency Counsel, as Expressed in Legal Briefs, Are Not Worthy of Deference in This Case 33

A. The Agency's Interpretation Is Inconsistent with Regulation Z's Plain Language 35

B. Under the Board's Own Rules, Legal Briefs Are Not Entitled to Deference 35

C. The Agency's Briefs Do Not Reflect a "Considered Judgment on the Matter in Question." 39

CONCLUSION 46

TABLE OF AUTHORITIES

Cases

Aaron v. SEC, 446 U.S. 680 (1980) 24

Auer v. Robbins, 519 U.S. 452 (1997) ..... passim

Barnhart v. Walton, 535 U.S. 212 (2002) 18, 38, 40

Boose v. Tri-County Metro. Transp. Dist., 587 F.3d 997 (9th Cir. 2009) 45

Christensen v. Harris County, 529 U.S. 576 (2000) ..... passim

Consol. Bank v. U.S. Dept. of Treasury, 118 F.3d 1461 (11th Cir. 1997) 35

Dept. of Revenue v. ACF Indus., 510 U.S. 332 (1994) 18

Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215 (2d Cir. 2006) 45

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) ..... passim

Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000) 40

Gonzalez v. Oregon, 546 U.S. 243 (2006) 40, 44, 45

Houston Police Officers' Union v. City of Houston, 330 F.3d 298 (5th Cir. 2003) 45

Keys v. Barnhart, 347 F.3d 990 (7th Cir. 2003) 45

Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50 (2004) 16

McCarthy v. Bronson, 500 U.S. 136 (1991) 16

Moore v. Canal Nat'l Bank, 409 A.2d 679 (Me. 1979) 26

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 44

United States v. Mead Corp., 533 U.S. 218 (2001) 38, 40, 44

Statutes and Regulations

5 U.S.C. § 553 38

15 U.S.C. § 1601(a) ..... passim

15 U.S.C. § 1604(a) 3

15 U.S.C. § 1606 ..... 1, 2, 3, 18

15 U.S.C. § 1606(c) 3, 19, 28

15 U.S.C. § 1632(a) 3, 19

12 C.F.R. § 226.1(d)(8) 36

12 C.F.R. § 226.6 3

12 C.F.R. § 226.6(a) 1, 3, 10, 17

12 C.F.R. § 226.6(a)(2) 13, 30

12 C.F.R. § 226.6(b) 17

12 C.F.R. § 226.6(c) 17

12 C.F.R. § 226.6(d) 17

12 C.F.R. § 226.6(e) 17

12 C.F.R. § 226.9(c) 3, 6, 9, 10

12 C.F.R. § 226.9(c)(1) ..... passim

12 C.F.R. § 226.9(c)(1)(i) 22

12 C.F.R. § 226.9(c)(2) 14

12 C.F.R. § 226.9(c)(2)(i) 22

12 C.F.R. § 226.9(c)(2)(ii) 22

12 C.F.R. § 226.9(g) 22

12 C.F.R. § 226.12(c) 17

12 C.F.R. § 226.13 17

12 C.F.R. § 226.16(a) 18

12 C.F.R. pt. 226, app. C 12, 36

12 C.F.R. pt. 226, supp. I, cmt. I-1 ..... 23, 36, 37

12 C.F.R. pt. 226, supp. I, cmt. I-2 ..... 36, 38

12 C.F.R. pt. 226, supp. I, cmt. 5a(b)(1)-2 29

12 C.F.R. pt. 226, supp. I, cmt. 6(a)(2)-2 29

12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 ..... passim

12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-2 21

12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-3 .....11, 23, 24, 25

Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), Pub. L. No. 111-24, sec. 101(a), 123 Stat. 1734 6

H.R. Rep. No. 90-1040 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962 19

Truth in Lending, 45 Fed. Reg. 80,648 (Dec. 5, 1980) 37

Truth in Lending, 46 Fed. Reg. 20,848 (Apr. 7, 1981) 20, 21

Truth in Lending, 46 Fed. Reg. 50,288 (Oct. 9, 1981) 36, 37, 39

Truth in Lending, 54 Fed. Reg. 24,670 (June 9, 1989) 26, 29

Truth in Lending, 70 Fed. Reg. 60,235 (Oct. 17, 2005) 5

Truth in Lending, 72 Fed. Reg. 32,948 (June 14, 2007) (proposed rule) ..... passim

Truth in Lending, 74 Fed. Reg. 5,244 (Jan. 29, 2009) (final rule) 5, 6, 32

Truth in Lending, 74 Fed. Reg. 36,077 (July 22, 2009) (interim final rule) 6

Truth in Lending, 74 Fed. Reg. 43,428 (Aug. 26, 2009) (proposed rule) 32

Other Authorities

Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae, *Aronson v. Peoples Natural Gas Co.*, No. 99-3000 (3d Cir. December 4, 1998) 41

Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae, *Consol. Bank v. Office of the Comptroller of the Currency*, No. 95-4831 (11th Cir. Feb. 28, 1996) 16, 41

Brief for the United States as Amicus Curiae, *Household Credit Service v. Pfenning*, No. 02-857 (S. Ct. May 2003) 41

Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, And Nothing But The Truth*, 25 Yale J. on Reg. 181 (2008) 36

John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893 (2004) 44

Mark Furletti, *Credit Card Pricing Developments and Their Disclosure* (Federal Reserve Bank of Phila. Jan. 2003) 4

Transcript of Oral Argument, *McCoy v. Chase Manhattan Bank*, No. 06-56278, 2008 WL 5109240 (9th Cir. Nov. 21, 2008) 27

INTRODUCTION

If the Truth in Lending Act (TILA) stands for anything, it is that creditors must prominently inform borrowers of the precise interest rate that applies to a loan *before* lending money at that rate. TILA's fundamental purpose is the "meaningful disclosure of credit terms"—in particular, the clear and uniform disclosure of interest rates and fees using a standardized formula known as the Annual Percentage Rate (APR). 15 U.S.C. §§ 1601(a), 1606. As implemented by Regulation Z, an essential element of TILA's mandatory disclosures is the requirement that creditors disclose the applicable APR not only at the time the loan is made, 12 C.F.R. § 226.6(a), but also "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1). The requirement of notice when the terms of the loan change is critical to TILA's disclosure scheme. Without it, creditors could circumvent TILA's disclosure requirements by prominently disclosing a low initial rate, only to raise that rate later without notice.[1]

This case is about Chase's practice of increasing its credit cardholders' APR without notice that the rate has increased or of the new rate that applies. Although Chase's cardholder agreement discloses an initial APR, it also provides that Chase "may" increase the initial rate "up to" a specified maximum rate if a monthly credit review discloses that the cardholder has made a late payment either to Chase or to any "other creditors." Under that provision, a single late payment on an electricity or phone bill, for example, would authorize Chase to increase the cardholder's interest rate, in its discretion, to

---

[1] Unless otherwise specified, citations to Regulation Z refer to the pre-2009 version of the regulation.

anywhere between the initial and maximum rates. When Chase chooses to increase the rate, it does not inform cardholders of the new rate, or even of the fact that the rate has changed, thus causing cardholders to accrue debt at an undisclosed rate and denying them the opportunity to switch to a different lender for their credit purchases. Even worse, Chase applies the new rate *retroactively* to the first day of the billing cycle, meaning that the new rate covers both future purchases and purchases the consumer has already made.

Chase's failure to provide notice of these rate increases flouts the plain language of Regulation Z, which requires that "if a periodic rate or other finance charge is increased because of the consumer's delinquency or default[,] the notice shall be given ... before the effective date of the change." 12 C.F.R. § 226.9(c)(1). Chase's practice also undermines TILA's core purpose of ensuring that borrowers know the specific APR that will apply to money they borrow. Because the court below correctly concluded that Regulation Z does not permit increases in APR without notice, its decision should be affirmed.

STATEMENT

A. Regulation Z's Disclosure Requirements

Congress enacted TILA in response to creditors' widespread practice of not disclosing a loan's interest rate, or disclosing it in a way that was misleading and difficult to compare with competing loans. Rather than imposing limits on the interest rates that creditors could charge, TILA addressed these problems by requiring "meaningful disclosure of credit terms"—in particular, the clear and uniform disclosure of a loan's APR. 15 U.S.C. §§ 1601(a), 1606. Congress intended TILA's disclosure requirements to serve the dual functions of "protect[ing] the consumer against inaccurate and unfair ... credit card practices" and allowing the credit market-

place to function more efficiently by making it possible for consumers to "compare more readily the various credit terms available." 15 U.S.C. § 1601(a). Under TILA, a consumer can have confidence that a 10% APR is really better than a 15% rate, and a creditor can have confidence that competitors are not gaining an unfair advantage by calculating or disclosing their interest rates in misleading ways.

TILA is thus essentially a disclosure statute, and the most important piece of information that it requires to be disclosed is the APR that applies to a loan. *See* 15 U.S.C. § 1606. The specific form of the required disclosures is set forth by the Federal Reserve Board in Regulation Z under the Board's authority to "prescribe regulations to carry out [TILA's] purposes." 15 U.S.C. § 1604(a). For open-end credit plans, such as credit-card accounts, Regulation Z requires a creditor to provide an "[i]nitial disclosure statement" that includes disclosure of several "items." 12 C.F.R. § 226.6. First among these required disclosures is the "circumstances under which a finance charge will be imposed and an explanation of how it will be determined," including "each periodic rate that may be used to compute the finance charge." *Id.* § 226.6(a). TILA and Regulation Z require the APR disclosure to be both "conspicuous[]" (more prominent than other disclosures), and "specific" (accurate to within an eighth of a percentage point). *See* 15 U.S.C. §§ 1606(c) & 1632(a).

Under Regulation Z, the start of the credit relationship is not the end of the creditor's disclosure obligations. The rules also require creditors to disclose the applicable APR upon a "[c]hange in terms." *Id.* § 226.9(c). Disclosure of term changes is a key component of Regulation Z's required disclosures because, without it, creditors could impose undisclosed rates on borrowers by prominently disclosing a low initial rate, only to raise that rate later without notice. That outcome would frus-

trate both TILA's consumer-protection function (by misleading consumers into acquiring debt that they might have avoided if they had known the actual rate), and its marketplace-efficiency rationale (by denying consumers the opportunity to shop for a better rate, both at the time they enter into a loan agreement and at the time the rate increases).

Importantly for this case, the applicable version of Regulation Z creates a dual scheme for providing notice of an APR increase, in which the notice required depends on the event that triggers the increased rate. *Id.* § 226.9(c)(1). For most APR changes, the regulation requires that "notice shall be mailed or delivered at least 15 days prior to the effective date of the change." *Id.* The "15-day timing requirement does not apply," however, when a lender increases the rate "because of the consumer's delinquency or default." *Id.* In that case, although § 226.9(c)(1) still expressly requires that "notice shall be given," it provides that the notice need only be sent "before the effective date of the change." *Id.*

B. Recent Amendments to Regulation Z

Beginning in the late 1990s, some creditors began including in their cardholder agreements language designed to reserve broad authority to change the terms of their loans. Mark Furletti, *Credit Card Pricing Developments and Their Disclosure* 8-9 (Federal Reserve Bank of Phila. Jan. 2003). These terms included creditors' reservation of the right to change any terms of their cardholder agreements unilaterally. They also included the imposition of "universal-default" provisions, under which creditors could increase the cardholder's interest rate if a monthly review of the cardholder's credit report showed a late payment to *any* creditor. *See Truth in Lending*, 72 Fed. Reg. 32,948, 33,009, 33,012 (June 14, 2007) (proposed rule) (discussing universal default). A

creditor's APR increase under a universal-default provision often comes as a surprise to consumers because the increase is unrelated to the cardholder's record of payment to that creditor. *See id.*

Concerned that Regulation Z's existing requirement of either contemporaneous or 15-day advance notice did not provide consumers with adequate notice of surprise term changes, the Board in December 2004 published an advance notice of proposed rulemaking that "commence[d] a comprehensive review of the open-end credit rules" provided in Regulation Z. *Truth in Lending*, 70 Fed. Reg. 60,235, 60,235 (Oct. 17, 2005). The stated goal of the rulemaking, which would be the first major revision of Regulation Z's open-end credit provisions since 1981, was "improv[ing] the effectiveness of the disclosures that creditors provide to consumers at application and throughout the life of an open-end ... account." 72 Fed. Reg. at 32,948.

Over five years, the Board developed an extensive record that culminated in a final rule issued in January 2009. *Truth in Lending*, 74 Fed. Reg. 5,244 (Jan. 29, 2009) (final rule). The record includes consumer testing designed to measure comprehension of disclosures, which show that consumers did not understand that creditors' reservation-of-rights clauses allowed changes in a disclosed rate without advance notice. 72 Fed. Reg. at 32,951-32,952, 33,009-33,011. Based on the results of its testing, the Board's staff concluded that "consumers are likely unaware of the events that will trigger such pricing" because "[t]he account-opening disclosures may be provided to the consumer too far in advance for the consumer to recall the circumstances that may cause his or her rates to increase," and because "the consumer may not have retained a copy of the account-opening disclosures and may not be able to effectively link the in-

formation disclosed at account opening to the current repricing of his or her account." *Id.* at 33,012.

Rather than prohibiting creditors from reserving the right to change APR, the Board addressed these problems by adopting a "major proposed change" to the timing of required disclosures under § 226.9(c). *Id.* at 32,948-32,949. The amended rule eliminated the timing distinction between term changes resulting from default and other sorts of term changes, consolidating the dual requirements of either contemporaneous or 15-day advance notice into a single 45-day advance-notice rule. *Id.* at 33,009-33,011; *see* 74 Fed. Reg. 5,244. By eliminating the option of contemporaneous notice and requiring 45 days' notice regardless of the reason for an increase in APR, the Board established that "creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract." 72 Fed. Reg. at 33,009-33,011.

In May 2009, shortly after the Board adopted its final rule, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), which imposed a variety of new substantive and disclosure requirements on creditors, including notice provisions. Pub. L. No. 111-24, sec. 101(a)(1), 123 Stat. 1734, 1735-36. Like the Board's own rules, the Credit CARD Act required 45 days' advance notice of interest-rate increases and significant changes in terms. *Id.* § 101(a), 123 Stat. 1735. The law prompted another round of rulemaking that resulted in the rule presently in effect. Because the Credit CARD Act's notice requirements largely paralleled those already adopted by the Board, the amended rule did not adopt further material changes to those requirements. *Truth in Lending*, 74 Fed. Reg. 36,077, 36,079 (July 22, 2009) (interim final rule).

C. Chase's Disclosure Practices and the Proceedings Below

The parties agree that, because the transactions at issue in this case took place before the effective date of the amended rules, the new 45-day advance-notice requirement adopted in 2009 for default-based APR increases does not apply to this case. Chase, however, takes the position that it is not required to provide even the *contemporaneous* notice of an APR increase required under Regulation Z's pre-amendment rule.

Chase bases this position on its cardholder agreement. The agreement discloses an initial APR, but also includes a universal-default provision reserving the right to increase the rate. *See* Pet. App. 20a-21a n.1. The provision states that Chase will conduct a monthly review of the cardholder's credit. *Id.* If the review discloses a late payment either to Chase or to any "other creditors," the agreement provides that Chase "may" increase the initial rate "up to" a specified maximum rate—in other words, anywhere in the range between the base and maximum rates. *Id.* In addition, Chase's agreement provides that the new rate "will apply to existing as well as new balances and will be effective with the billing cycle ending on the review date," meaning that Chase will apply the new, higher APR retroactively to the first day of the just-ended billing cycle. *Id.* For example, if a cardholder is late in making a minimum payment due on the 25th day of a billing cycle and Chase decides to increase the cardholder's interest rate, the agreement allows Chase to apply the increased rate to the beginning of the

just-ended cycle—i.e., 25 days before the default even occurred.[2]

---

[2] The relevant provision of the cardholder agreement states:

> **Preferred Customer Pricing Eligibility** ... Your Account will be reviewed every month on your Statement Closing Date to determine its continued eligibility for the Preferred or Non-Preferred rates. On each monthly review, we may change your interest rate and impose a Non-Preferred rate up to the maximum Non-Preferred rate described in the Pricing Schedule for each occurrence when you do not meet the conditions described below to be eligible for Preferred [rates]. Any changes in pricing as a result of the monthly reviews for Preferred or Non-Preferred rates will apply to existing as well as new balances and will be effective with the billing cycle ending on the review date.
>
> To keep Preferred rates, the following conditions must be met as of the review date:
>
> - you have made at least the required minimum payments when due on your Account and on all other loans or accounts with us and your other creditors; and
> - the credit limit on your Account has not been exceeded; and
> - any payment on your Account has not been returned unpaid.
>
> If you do not meet all of these conditions ... your Account may lose its Preferred rates ....
>
> We may obtain consumer reports from credit bureaus on you at any time in the future. We may use the reports and their contents, as well as information about your Account including its payment history and level of utilization over the life of your Account, and your other relationships with us and our affiliates to review your Account including for the purposes of determining its eligibility for Preferred rates and of establishing the Non-Preferred rate that may apply to your Account.

Pet. App. 20a-21a n.1.

After Chase increased his interest rate pursuant to its default-rate provision, respondent James A. McCoy filed suit in California claiming that Chase's practices violated TILA and state law. Chase removed the case to the United States District Court for the Central District of California and filed a motion to dismiss. Pet. App. 37a. Chase's motion argued that § 226.9(c)'s requirement that a creditor provide notice of a change in "any term required to be disclosed under § 226.6" did not refer to increases in APR or other terms of the *loan*, but to changes in the terms of the *contract* between the parties (i.e., the text of the cardholder agreement). Because Chase had not amended the language of its "Preferred Customer Pricing Eligibility" clause, it contended that there had been no change in "terms" and thus that Regulation Z required no notice of the increased rate. As a separate argument, Chase also contended that, because its cardholder agreement disclosed that it reserved discretion to increase a cardholder's APR up to a maximum rate, it was excused from providing notice under the Official Staff Commentary to Regulation Z—the Board's only authorized interpretation of Regulation Z—which provides that "[n]o notice of a change in terms need be given if the *specific change* is set forth initially." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 (emphasis added).

The district court granted Chase's motion to dismiss, accepting Chase's argument that the decision to increase APR was an "implementation," rather than a change, in the "terms required to be disclosed." Pet. App. 42a. The court of appeals reversed. The court relied on language in the Official Staff Commentary stating that "a notice of change in terms is required" for "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." Pet. App. 4a. The court held that the plain meaning of this language "is to re-

quire notice when a cardholder's interest rates increase because of a default." *Id.*

SUMMARY OF ARGUMENT

Chase's practice of retroactively increasing cardholders' APR without providing notice of the increase and the new rate it has chosen to apply flouts the plain language of Regulation Z. Section 226.9(c)(1) requires notice "[w]henever any term required to be disclosed under § 226.6 is changed," and a loan's APR is not only one of the terms "required to be disclosed under § 226.6," but is the most important disclosure that section requires. *Id.* § 226.6(a). Indeed, § 226.9(c)(1) states explicitly that, "if a periodic rate or other finance charge is increased because of the consumer's delinquency or default[,] *the notice shall be given* ... before the effective date of the change." 12 C.F.R. § 226.9(c)(1) (emphasis added).

In spite of § 226.9's clear mandates, Chase argues that Regulation Z requires a creditor to provide notice of an increased APR only if it changes the text of its underlying cardholder agreement and, even then, only when the agreement does not expressly reserve the right to make such an amendment. Neither Chase nor the government's amicus brief, however, presents a plausible explanation of how § 226.9(c)'s requirement of notice of a change in "any term required to be disclosed under § 226.6" could refer to changes to the text of a creditor's cardholder agreement, such as Chase's "Preferred Customer Pricing Eligibility" clause, rather than to the terms that § 226.6 requires to be disclosed, such as the APR. And although Chase entirely ignores the issue, its argument also depends on the assumption that Regulation Z allows it not only to raise rates without notice, but also to impose the new rates retroactively to existing debt. Even if the regulation allowed Chase's other prac-

tices, increasing the APR retroactively to a time before notice was even possible would violate § 226.9.

Neither Chase nor the government provides a convincing explanation of how their reading of Regulation Z could be squared with the regulation's central purpose of requiring prominent and specific disclosure of a loan's APR. Chase's reading would radically change creditors' obligations under TILA in a way that would largely eviscerate the statute's remedial scheme, eliminating the notice requirement for an increase in APR when the creditor reserves the right to make the increase in the cardholder agreement, regardless of whether the increase results from a cardholder default or some other reason. Indeed, Chase's position would continue to allow creditors to increase APR without notice even under the 2009 Regulation Z amendments, thus frustrating a central purpose for which Chase agrees the amendments were adopted.

Aside from the plain language of Regulation Z itself, the agency's Official Staff Commentary states no fewer than three times that notice is required under precisely the circumstances at issue here. 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 ("notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase"); *Id.* (providing, "as an example," that notice is required "when an increase may occur under the creditor's contract reservation right to increase the periodic rate"); *Id.*, cmt. 9(c)(1)-3 ("a notice of change in terms is required" for "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default"). The commentary only exempts from the notice requirement cases where the "specific change" has previously been disclosed. *Id.*, cmt. 9(c)-1. Chase's cardholder agreement's provision that it may (or may not) exercise its discretion to set the interest rate somewhere within a

range of possible rates (for example, between a starting rate of 9.99% and a maximum rate of 31.99%) is not, under any sense of the word, "specific."

Chase urges this Court not to consider the serious consequences raised by its position and instead to defer to the position of the Board's legal counsel, as set forth in recent amicus briefs in this Court and the First Circuit. *See* Pet.'s Br. 19 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Respondent McCoy does not dispute that the Board has substantial discretion to interpret TILA, and that this Court in *Auer* granted a high level of deference to an agency amicus brief that interpreted the agency's own regulations. But deference even to the Board's authoritative interpretations of Regulation Z is appropriate only "absent a clear expression" in the statutory and regulatory language. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980). Here, Regulation Z is clear that notice is required when a creditor increases a cardholder's APR.

In any event, the Board's *official* interpretation of Regulation Z and the unofficial views expressed in its rulemaking proceedings—as opposed to the views its legal counsel has expressed in briefs—are both consistent with McCoy's understanding of the regulatory language and independently demonstrate that notice is required in these circumstances. In contrast, the briefs of agency counsel are not official expressions of agency opinion and, under the terms of Regulation Z itself, are not entitled to deference. *See* 12 C.F.R. pt. 226, app. C; *Ford Motor Credit Co.*, 444 U.S. at 567 n.10. Moreover, Chase's plea for deference does not rely on agency counsel's special expertise or knowledge about the purposes of Regulation Z to which this Court would be justified in deferring. On the contrary, the Board has itself determined that practices such as Chase's undermine the purposes of TILA by misleading consumers about the inter-

est rate that applies to their loans. This Court is just as capable as the agency's lawyers of reading the relevant regulatory language. Given the absence of any reason to defer to the government's unsupported reading of Regulation Z, the Court should read the rule, as its language and purpose demand, to require notice when a creditor increases a loan's APR due to a default.

ARGUMENT

I. Regulation Z Requires Chase to Inform Cardholders When It Increases Their APR.

A. Regulation Z's Plain Language Provides That Notice of an Increased APR Due to Default "Shall Be Given ... Before the Effective Date of the Change."

Regulation Z's plain language requires that Chase disclose an increase in its APR that results from a cardholder's default. The first sentence of § 226.9(c)(1) ("Change in terms") requires written notice "[w]henever any term required to be disclosed under § 226.6 is changed." One of the terms that § 226.6 requires to be disclosed is the loan's APR. *See* 12 C.F.R. § 226.6(a)(2). The meaning of the two sections taken together is both straightforward and inescapable—written notice is required whenever a loan's APR is changed. If there were any doubt that § 226.9(c)(1) refers to changes in interest rates, it would be dispelled by its second (and last) sentence, which says so explicitly: "[I]f a periodic rate or other finance charge is increased because of the consumer's delinquency or default[,] *the notice shall be given* ... before the effective date of the change." (emphasis added).[3]

---

[3] The entire text of the notice provision in the applicable version (continued ...)

Notice of an increase in APR resulting from default is not only expressly mandated by § 226.9(c)(1), which governs cases where notice is required, but also by § 226.9(c)(2), which governs cases where it is *not* required. That subsection provides a catalog of instances in which no additional notice is necessary, and an increase in APR resulting from default is not one of them. To the contrary, the subsection provides that no notice is required when the change results from a default "*other than an increase in the periodic rate or other finance charge.*" *Id.* § 226.9(c)(2) (emphasis added). Because the change here *did* involve an increase in the periodic rate,

---

of Regulation Z (excluding one portion relevant only to home-equity plans) reads as follows:

> (c) Change in terms—
>
> (1) Written notice required. *Whenever any term required to be disclosed under § 226.6 is changed* or the required minimum periodic payment is increased, *the creditor shall mail or deliver written notice of the change to each consumer who may be affected.* The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or *if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.*
>
> (2) Notice not required. No notice under this section is required when the change involves late payment charges, charges for documentary evidence, or over-the-limit charges; a reduction of any component of a finance or other charge; suspension of future credit privileges or termination of an account or plan; or when the change results from an agreement involving a court proceeding, or from the consumer's default or delinquency (*other than an increase in the periodic rate or other finance charge*).

12 C.F.R. § 226.9 (emphasis added).

the plain meaning of the language again dictates that an increase in APR should have been disclosed.

The notice required for the imposition of a default rate is not discussed elsewhere in § 226.9 or, for that matter, in any other Regulation Z provision governing open-end credit. Therefore, the regulation's only two mentions of default rates expressly contradict Chase's position here.

B. Chase's Contractual Reservation of Rights Was Not a "Term Required to Be Disclosed Under § 226.6."

Chase's only textual explanation for how its failure to provide notice is consistent with § 226.9(c)(1)'s clear notice requirements is its contention that the phrase "any term required to be disclosed under § 226.6" refers not to changes to the APR and other terms of the *loan*, but to changes to the terms of the *contract* between the parties (i.e., the text of the cardholder agreement). Chase argues that the relevant "term" here was the contractual provision giving it the right to increase cardholders' interest rate to anywhere between the starting and maximum rates. Because it initially disclosed the *possibility* that it could increase the rate to somewhere within this range, Chase argues that subsequently setting the APR anywhere within that range amounted to an "implementation" of the terms of the agreement and not a "change" in those terms.

Although Chase has had success in convincing lower courts of this view of the law, its distinction between "implementations" and "changes" appears nowhere in the language of TILA, Regulation Z, or the associated Official Staff Commentary. Although the word "terms," taken out of its context in the regulation containing it, could reasonably be read to mean either *contractual* terms (i.e., the precise language of the contract), or *cred-*

it terms (i.e., the APR and other relevant features of the loan), regulatory language, like statutory language, cannot be read in isolation. *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted) (interpreting TILA); *see also Christensen v. Harris County*, 529 U.S. 576, 583–84 (2000) (rejecting an agency's interpretation as inconsistent with a statute "viewed in the context of the overall statutory scheme"). Indeed, the Board's counsel in other cases have themselves stressed the importance of reading TILA and its implementing regulations in the context of the statute's purpose and language as a whole. *See, e.g.*, Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae, *Comsol. Bank v. Office of the Comptroller of the Currency*, No. 95-4831 (11th Cir. Feb. 28, 1996).

By focusing exclusively on the regulation's use of the phrase "any term," Chase and the lower courts that have accepted its view ignore the meaning of those words in the context in which they appear. Section 226.9 refers not just to "any term," but to "any term *required to be disclosed under § 226.6*." 12 C.F.R. § 226.9(c)(1) (emphasis added). Although § 226.6 does not use the word "term," it does require disclosure of five specific "items," of which, as applied to Chase's and other typical credit-card plans, only three must be disclosed:

1. The finance charge, including "disclosure of *each periodic rate* that may be used to compute the finance charge, the range of balances to which it is

applicable, and the corresponding annual percentage rate." *Id.* § 226.6(a) (emphasis added).

2. "Other charges," which the section defines as "[t]he amount of any charge other than a finance charge that may be imposed as part of the plan, or an explanation of how the charge will be determined." *Id.* § 226.6(b).

3. "A statement that outlines the consumer's rights and the creditor's responsibilities under 12 C.F.R. §§ 226.12(c) and 226.13 and that is substantially similar to the statement found in Appendix G." *Id.* § 226.6(d).[4]

These specific required disclosures constitute the entirety of § 226.6, and § 226.9(c)'s reference to "any term required to be disclosed under § 226.6" could only conceivably refer to two of them: (1) the finance charge, including the loan's APR, and (2) charges other than the finance charge. *Id.* § 226.6(a), (b). Here, although Chase may not have changed the terms of its contract, it *did* change the APR, which is the most important "term required to be disclosed by § 226.6." The only reasonable reading of Regulation Z's language is that the change in APR should have been disclosed. Moreover, Regulation Z itself confirms that a loan's APR is one of the "terms" required to be disclosed by expressly requiring notice "if a periodic rate or other finance charge is increased because of the consumer's delinquency or default." *Id.* § 226.9(c)(1).

---

[4] The remaining two required disclosures both deal with secured credit: (1) "the creditor's security interest in property purchased under the plan," and (2) "information about home equity plans." 12 C.F.R. § 226.6(c), (e).

Chase's contrary interpretation of "any term required to be disclosed under § 226.6" to refer to a change in the text of its default-rate provision, rather than a change in a credit term like APR, is nonsensical. Congress designed TILA to "assure a meaningful disclosure of *credit* terms so that the consumer will be able to compare more readily the various *credit* terms" available in the market. 15 U.S.C. § 1601(a) (emphasis added). The central purpose of TILA is to ensure that such terms—and in particular, the loan's APR and finance charges—are communicated precisely and prominently to the consumer. *Id.* §§ 1601(a), 1606. Regulation Z therefore does not require disclosure of contract terms (such as Chase's "Preferred Customer Pricing Eligibility" provision), but of specific "credit terms" (in particular, interest rate) that creditors in the past had routinely communicated to consumers in ways that were confusing and impossible to compare effectively. Indeed, there would be no need for TILA to require disclosure of contractual terms—contracts, after all, require consent, and creditors have no choice but to disclose the language of their credit agreements if they wish borrowers to be bound by them.

Both TILA and Regulation Z thus regularly use the word "terms" to refer to the terms of *credit*, especially APR, and not to the specific language of the cardholder agreement. *See, e.g.*, 15 U.S.C. § 1601(a) (stating TILA's purpose as to "assure a meaningful disclosure of credit terms"); 12 C.F.R. § 226.16(a) ("If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged or offered by the creditor."). In general, "identical words used in different parts of the same act are intended to have the same meaning." *Dept. of Revenue v. ACF Indus.*, 510 U.S. 332, 342 (1994) (internal quotation marks omitted); *see also Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (words should not be interpreted differently in

closely related contexts). Given the centrality of disclosure of APR and other credit terms to TILA and Regulation Z, it is implausible that the Board would have switched to a discussion of *contract* terms when referring to the key section of the regulation that requires *credit* terms to be disclosed.

C. Chase's Interpretation of Regulation Z Would Eviscerate Its Primary Purposes of Protecting Consumers and Facilitating Accurate Comparison of Loans.

Congress enacted TILA in response to a rise in "inconsistent and noncomparable [credit disclosure] practices," which created "confusion in the public mind about the true costs of credit." H.R. Rep. No. 90-1040, at 5 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970. To combat this problem, and to allow consumers to more accurately compare loans, TILA requires that the "cost of credit ... be disclosed fully, simply, and clearly." *Id.* at 3, 1968 U.S.C.C.A.N. at 1965. Central to TILA's required disclosures is the uniform disclosure of a loan's APR. The required APR disclosures must be both specific, *see* 15 U.S.C. § 1606(c) (providing the maximum permissible margin of error as one-eighth of one percent), and prominent, *see* 15 U.S.C. § 1632(a) (providing that APR and finance charges "shall be disclosed more conspicuously than other terms"). By requiring specific and prominent APR disclosure, TILA allows consumers to focus on a single term while shopping for credit, giving them an easy mechanism for accurately comparing costs—the objective at the very "heart" of TILA's remedial scheme. H.R. Rep. No. 90-1040, at 24, 1968 U.S.C.C.A.N. at 1990 (supplemental views of Rep. Wright Patman et al.); *id.* at 40, 1968 U.S.C.C.A.N. at 2005 (supplemental views of Rep. William B. Widnall et al.).

Chase's interpretation of Regulation Z would eviscerate TILA's notice requirements. Under Chase's reading, any creditor could satisfy the regulation's requirements by—as Chase did here—providing a precise and prominent disclosure of a *base* APR and finance charges and reserving the right to change those terms in the future. A creditor that set a maximum rate at 50%, 100%, or even 300% could then freely change the rate to anywhere within that range. As long as the creditor included, somewhere in the agreement's fine print, the *possibility* that the loan's terms might later change, the creditor would be under no obligation to notify the cardholder when it chose to increase the APR, or to disclose the new rate it had chosen to apply. As a result, the cardholder would accrue additional debt at an undisclosed rate and would lose the opportunity to shop for a lower-priced loan. Congress could not have intended that creditors could render meaningless its careful system of specific and prominent disclosures by disclosing one set of terms only to impose a different set of undisclosed terms later.

Chase's reading of the law would go even further, allowing creditors at the end of the first month to apply the new rate *retroactively* to the date of the cardholder agreement, rendering the initial disclosed rate an irrelevancy. The retroactive imposition of interest rates, however, is fundamentally incompatible with TILA's notice scheme. Before 1981, Regulation Z prohibited creditors from changing the terms of a loan in the middle of a billing cycle, instead requiring notice of a change at least 15 days before the start of the cycle in which the change would become effective. *See Truth in Lending*, 46 Fed. Reg. 20,848, 20,863 (Apr. 7, 1981). The regulations at issue in this case come from the Board's 1981 revisions to Regulation Z, which amended the rules to allow mid-cycle changes, but only when the creditor provides notice

of the change and "*when there is clearly no retroactive impact.*" *Id.* at 20,863 (emphasis added); *see* 12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-2. By increasing interest rates without notice *and* applying those rates retroactively, Chase entirely circumvents these protections. Chase cites no authority for the proposition that Regulation Z allows it to increase a cardholder's interest rate retroactively to a time before notice was even possible.

Recognizing the unacceptable ramifications of its rule, Chase attempts to limit the damage by imposing an artificial distinction between a creditor's increase in APR pursuant to a contract provision that generally reserves the right to change contract terms (which Chase classifies as an example of the imposition of a new term), and an increase pursuant to a contract provision that reserves the right to increase the APR in the event of cardholder delinquency or default (which Chase classifies as an implementation of an existing term). But the plain language of the Official Staff Commentary directly contradicts Chase's reading, providing that notice is required even when the increase is "under the creditor's contract reservation of right to increase the periodic rate." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1. Moreover, nothing in § 226.9(c)'s notice requirements distinguishes APR increases resulting from default from other sorts of APR increases, except to provide that notice in the case of defaults can be provided contemporaneously instead of 15 days in advance. Regardless of whether the rate increase was pursuant to a "reservation of rights" or a "default provision," a creditor would still be "implementing" a contractual term—and consequently immune from § 226.9(c)'s requirements—as long as the possibility of the rate increase were disclosed somewhere in the cardholder agreement. Holding § 226.9(c) inapplicable to implementation of previously disclosed terms would thus

exempt creditors from disclosing *any* increase in APR, not to mention changes in other terms of the loan.

Indeed, if Chase were correct that "changes in terms" as used in § 226.9 is limited to textual changes in the contract, even the Board's recent amendments to § 226.9—which Chase agrees were the result of the Board's policy decision to require improved notice of rate increases—would deprive consumers of notice of many increases in their APR. To be sure, amended Regulation Z would narrowly remedy the specific problem at issue in this case by requiring creditors to disclose increases in interest rates that result from a cardholder's default. That specific change is the result of new subsection 226.9(g), which requires notice whenever "[a] rate is increased due to the consumer's delinquency or default," rather than (as in the prior rule) when there has been a "change in any term required to be disclosed." 12 C.F.R. § 226.9(g) (2009). But increases in rates for reasons *other* than delinquency or default remain covered by amended rule § 226.9(c), which continues to require notice only when there has been a change in "terms required to be disclosed" under § 226.6. *See id.* § 226.9(c)(2)(i) (2009); *see also id.* § 226.9(c)(2)(ii) (2009) (defining "significant change in account terms" as "a change to a term required to be disclosed" under § 226.6). Chase's view that changes in terms occur only on amendment of a cardholder agreement would therefore create the paradoxical effect of requiring notice *only* when a creditor increases the interest rate pursuant to a contractual default provision. Any other APR increase, and any changes in credit terms other than APR (including any changes related to home-equity loans, *id.* § 226.9(c)(1)(i) (2009)), would not require notice. Because Regulation Z could not reasonably have been intended to require notice only when a consumer defaults, its references to changes in terms

"required to be disclosed" must refer to APR, not to the text of a lender's cardholder agreement.

II. The Board's Past Interpretations of Regulation Z Strongly Support the Conclusion that the Regulation Requires Disclosure of Increases in a Loan's APR.

Chase makes little effort to address the plain language of Regulation Z, and instead devotes the bulk of its brief to urging this Court to defer to the agency's interpretations of that regulation. Because the plain language of Regulation Z establishes that notice is required, however, there is no reason for the Court to look beyond that language. *See Ford Motor Credit Co.*, 444 U.S. at 560; *see also Christensen*, 529 U.S. at 588. Even if this Court were to defer to the agency, deference would be warranted only to the agency's authoritative interpretations of Regulation Z. *See Ford Motor Credit Co.*, 444 U.S. at 567 n.10 ("Unofficial interpretations have no special status under [TILA]."). The sole source of official interpretations of the rules is the Official Staff Commentary. *See* 12 C.F.R. pt. 226, supp. I, cmt. I-1. In all of its official commentary, the agency has stated, consistent with the plain language of Regulation Z, that notice is required in the circumstances here.

A. The Official Staff Commentary, Like Regulation Z, Expressly Requires Disclosure of Increased APR Due to Default.

1. Like Regulation Z itself, the Official Staff Commentary expressly requires notice when a creditor increases a loan's APR pursuant to a default-rate provision. Comment 9(c)(1)-3 provides that "a notice of change in terms *is required* ... if there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-3 (emphasis added). Although the notice

need not be provided in advance, the commentary requires that the notice be sent at least contemporaneously with the increase in the rate. *Id.* (providing that the notice may be "mailed or delivered as late as the effective date of the change").

Chase argues (at 22-23) that this express notice requirement does not apply here because the comment only governs "timing" and is therefore relevant only when some other provision independently requires notice. But the comment's statement that "notice of change in terms is required" is an express, affirmative requirement, not a limitation on timing. Although the comment also explains that contemporaneous notice instead of 15-day advance notice is required for a default-based rate increase, that does not diminish the clear import of the commentary's language. *Cf. Auron v. SEC*, 446 U.S. 680, 697 (1980) ("[I]t would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say."). Indeed, the apparent purpose of the language is make clear that by dispensing with the requirement of *advance* notice, the regulation did not also eliminate the requirement that *contemporaneous* notice be provided. Chase's position that it need not send even contemporaneous notice is therefore flatly inconsistent with the comment's plain language. Moreover, Comment 9(c)(1)-3 need not stand on its own—Comment 9(c)-1 independently provides, without any mention of timing, that "notice must be given" when, as here, "an increase may occur under the creditor's contract reservation right to increase the periodic rate." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1.

Chase's reading of Comment 9(c)(1)-3 would transform it from a notice requirement into a license to further deprive consumers of notice. Because, under Chase's view, notice of imposition of a default rate would

be excused whenever the rate is specified in the cardholder agreement, the comment would come into play only when a creditor applied a penalty rate that was *not* specified in the agreement, such as a rate that exceeded the maximum disclosed rate. And the only role for the comment to play in those circumstances would be to permit the creditor to give *contemporaneous*, rather than advance, notice of the new rate. In other words, the comment in Chase's view serves the sole function of providing that a creditor can increase a cardholder's APR *above* the maximum default rate specified in the cardholder agreement, without providing prior notice that the terms of the agreement have changed. That, however, would render a cardholder agreement's "maximum" default rate an irrelevancy, subject to arbitrary and limitless increase by the creditor. That cannot be what the Board's staff had in mind when it required notice of "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-3.

2. As an alternative to its argument that a rate increase is not a "change in terms," Chase relies on an exception to the notice requirement in Comment 9(c)-1, which explains that no notice of a change of terms need be given if the "specific change is set forth initially" in the cardholder agreement. 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1. Comment 9(c)-1's exception, however, is patently inapplicable to Chase here because Chase's agreement did not set forth the "specific change" in APR that it later imposed. As the comment expressly states, "notice *must be given* if the contract allows the creditor to increase the rate *at its discretion* but does not include specific terms for an increase," including, as here, when "an increase may occur under the creditor's contract reservation right to increase the periodic rate." *Id.* (emphasis added).

Comment 9(c)-1's narrow exception to the notice requirement serves the common-sense purpose of avoiding redundant disclosures by providing that a creditor need not re-disclose a specific change of which it has already informed the cardholder. For example, if a creditor provides in its initial disclosure that a special introductory rate will apply for the first six months, after which the rate will automatically increase to a different rate, the lender does not need to re-disclose the rate increase at the time the new rate goes into effect. *See Moore v. Canal Nat'l Bank*, 409 A.2d 679, 687 (Me. 1979) ("If the terms of the original loan were fully disclosed, the debtor has no reason to be surprised or aggrieved by a virtually automatic increase in rate in accordance with those terms.").

Chase, however, takes Comment 9(c)-1 far beyond its language, arguing that the comment excuses it from providing notice even when it has *never* disclosed the specific rate that it will apply. Without defining the word "specific" or even acknowledging it as a potential limit on the scope of Comment 9(c)-1's exception, Chase appears to assume that its reservation of right to increase a cardholder's interest rate in the event of a default anywhere "up to" the maximum default rate is a "specific change" under the exception because it put cardholders on notice of the *possibility* of an APR increase and a maximum rate that Chase could apply.

The comment, however, says nothing about "potential" rate increases or "maximum" rates. As the Board's staff explained during rulemaking on a parallel exception for home-equity loans, a "specific change" is a change that is "contemplated on the occurrence of a *specific event*," for which "*[b]oth* the triggering event and the resulting modification must be stated with *specificity*." *Truth in Lending*, 54 Fed. Reg. 24,670, 24,680 (June 9, 1989) (final rule) (emphasis added). Here, Chase's reser-

vation of right states only that it "may," in its discretion, increase a cardholder's rate "up to" a stated maximum. Moreover, Chase's exercise of discretion could be triggered by a late payment to Chase or any "other creditors," is based on a variety of vague factors such as "payment history" and "other relationships with [Chase] and [its] affiliates," and is subject to a complex formula that Chase never disclosed to cardholders. Tr. of Oral Argument, *McCoy v. Chase Manhattan Bank*, No. 06-56278, 2008 WL 5109240 (9th Cir. Nov. 21, 2008) (statement by Chase's lawyer that, "having seen some of the complicated math that goes into that formula I can frankly say [that] I'm not smart enough to figure it out"). Chase's reservation-of-rights clause therefore gives cardholders no way of knowing with certainty whether the provision has been triggered at all, much less how Chase would choose to exercise its discretion in setting the new rate. Cardholders could not predict based on Chase's clause whether it would leave the APR at the base rate, increase it to the maximum, or set it somewhere in between. A disclosure that leaves borrowers subject to an unknown interest rate is, in no sense of the word, "specific."

Even if cardholders were able to determine whether Chase had exercised its discretion to increase their interest rates, requiring creditors to comply with the commentary's plain language by providing notice of the *specific* applicable APR would not, as Chase suggests (at 28), "promote form over substance." Permitting disclosure of maximum rates or ranges of potential rates would make it impossible for consumers to effectively compare the rates of competing loans at the time they enter into their cardholder agreements. TILA is designed to ensure that consumers are able to compare very accurate and specific APRs, but consumers under Chase's view of the law would be faced with the impossi-

ble task of comparing, for example, an APR of 25% with APRs of "maximum 50%" or "between 5% and 50%." The relative value of such non-specific disclosures would depend on how each lender chose to exercise its discretion. For example, a loan with a base rate of 5% and a maximum rate of 50% would be more expensive to a consumer than a competing loan with a base rate of 25% and a maximum rate of 75% if the first lender routinely increased the rate to the maximum while the second lender almost always left the rate unchanged. Indeed, TILA's requirement that creditors disclose a rate accurate to within an eighth of a percentage point, 15 U.S.C. § 1606(c), would be rendered meaningless if lenders could disclose a double- or even triple-digit range of possible rates that the lender might later impose without notice.

3. As an "example" of a case where notice would be required, Comment 9(c)-1 provides that "notice must be given" when "an increase may occur under the creditor's contract reservation right to increase the periodic rate." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1. The example squarely governs this case because Chase's contract allowed it to "increase the rate in its discretion," and Chase did not disclose the "specific" APR that it would apply in the event of a rate increase.

The three other examples included in the comment set forth, "[i]n contrast," the kinds of cases in which no notice is required because the "specific change" had previously been disclosed. *Id.* Each example involves situations where both a specific new rate and the circumstances that trigger that rate are disclosed in advance:

1. a variable-rate plan;

2. a preferential rate agreement under which the preferred rate will increase to a higher rate upon termination of the cardholder's employment; and

3. a preferential rate agreement under which the preferred rate will increase to a higher rate when the cardholder's balance on a related bank account drops below a minimum amount.

Id.

The common thread among these examples is that, in stark contrast to the example involving a "contract reservation right to increase the periodic rate," each involves circumstances where the cardholder can identify whether the higher rate applies and, if so, what that rate actually is. A variable rate plan, listed as the first example, is "tied to an index or formula" that a borrower can use to determine the applicable interest rate at any time. *Id.*, cmt. 5a(b)(1)-2; *see also id.* cmt. 6(a)(2)-2 (providing that "a plan that simply provides that the creditor reserves the right to raise its rates ... would not be considered a variable-rate plan for Truth in Lending disclosure purposes"). Similarly, the Board's staff has explained that the second example (where a preferred rate increases upon termination of the cardholder's employment) involves a situation where "a *specified* higher rate ... will apply if the borrower's employment with the creditor ends." 54 Fed. Reg. at 24,680 (emphasis added). In that case, as in the other examples, the creditor can determine both the "specified higher rate" and whether the circumstance that triggers that rate (termination of employment) has been satisfied. Unlike here, cardholders need not resort to guesswork to know the applicable rate.

The government (at 13) makes a weak attempt to reconcile the agency's position with 9(c)-1 by analogizing

the third example (a preferential rate tied to the cardholder's balance on a related bank account) to a default-rate provision like the one at issue here. But allowing a bank account balance to fall below a certain amount is not a "default," and nothing in the example suggests that the lender's decision to raise rates would be discretionary. Rather, § 226.6 makes clear that disclosure of rates that depend on a bank account balance requires "disclosure of *each* periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate." 12 C.F.R. § 226.6(a)(2) (emphasis added). Both the bank account balance and the particular rate that applies to that balance are thus objective, external facts that a cardholder can use to determine what rate applies at a particular time.

B. The Board Staff's Statements During Rulemaking Proceedings, Although Not Representing the Staff's Official Views, Also Support § 226.9(c)'s Express Notice Requirement.

Unlike the Official Staff Commentary, staff comments made in the course of rulemaking do not set forth the staff's official interpretation of the regulation. *See Ford Motor Credit Co.*, 444 U.S. at 567 n.10. Whereas the Official Staff Commentary is the result of the agency's considered determination following public notice and comment, a proposed rule is by definition a preliminary document designed to be superseded by a final rule after the notice-and-comment period is complete. Therefore, the staff's unofficial comments during rulemaking are not entitled to any deference beyond whatever persuasive value they may contain.

In any event, the portions of the 2004-2009 rulemaking on which Chase relies do not contain the "interpretation" of Regulation Z that Chase reads into them. From

the "more than 1,000 pages," Pet's Br. 8, of the rulemaking record, Chase fails to identify a single instance where the agency staff interpreted the phrase "change in terms required to be disclosed" to refer to the text of a contractual provision rather than to the terms of credit listed in § 226.6. Instead, as in Regulation Z and the Official Staff Commentary, the rulemaking record uses the word "terms" in a way that can refer only to the terms of credit rather than to the text of a cardholder agreement. In the section of the proposed rule on which Chase primarily relies, for example, the Board's staff states the "general rule ... that creditors must provide 15 days' advance notice of changes in *terms required to be included in the account-opening disclosures*." 72 Fed. Reg. at 33,009 (emphasis added). Similarly, Chase fails to point to any instances where the agency distinguished between "implementation" of terms and "changes" in those terms, or where it has read the phrase "specific change" to encompass discretionary rate increases or a contract reservation right to increase APR.

Chase also suggests (at 25) that the very fact that the Board adopted the 2009 amendments supports its position because the "major proposed change" in the amendments would not have been necessary if Regulation Z already required notice in these circumstances. Chase's argument, however, rests on a fundamental misunderstanding of the nature of Regulation Z's notice requirements and of the amendments under the agency's consideration. As previously explained (at pp. 5-6), the pre-amendment version of § 226.9(c) imposed two separate notice requirements: (1) 15-day advance notice for most changes in "term[s] required to be disclosed under § 226.6," and (2) contemporaneous notice for rate increases resulting from a default. The portions of the record on which Chase relies, and the rulemaking record as a whole, make clear that the "major proposed change"

in the amendments was not the addition of a new notice requirement where none existed before, but the merging of the previously separate contemporaneous and 15-day advance-notice requirements into a single 45-day advance-notice rule. Even the portions of the record that Chase quotes in its brief make that clear. *See* Pet.'s Br. 24-25 (noting that the pre-amendment rules "permit[ted] *immediate* application of penalty pricing") (emphasis added). The Board's conclusion that contemporaneous notice provided insufficient protection to consumers flies in the face of Chase's contention that not even contemporaneous notice was required. Indeed, the premise of the rulemaking was that contemporaneous notice did not provide sufficient protection to consumers and that a longer time period between notice of a rate increase and its effective date was needed. *See supra*, pp. 5-6.[5]

In the remaining portions of the rulemaking on which it relies, Chase simply takes the agency's statements out of context to suggest conclusions that the agency never made. For example, Chase relies (at 32) on a section of the 2007 proposed rule stating that no notice is required when "credit card account agreements permit the card issuer to increase the periodic rate if the consumer

---

[5] *See* 74 Fed. Reg. at 5,253 (noting that, under the pre-amendment rule, "creditors need not inform consumers *in advance* if the rate applicable to their account increases due to default or delinquency") (emphasis added); *Truth in Lending*, 74 Fed. Reg. 43,428, 43,436 (Aug. 26, 2009) (proposed rule) ("*Advance* notice is not required in all cases ... .") (emphasis added); see also 72 Fed. Reg. at 33,012 (stating that the proposed amendments "seek[] to *improve the effectiveness of the disclosures* given to consumers regarding the conditions in which penalty pricing will apply") (emphasis added); *id.* (proposing that "*disclosures be provided prior to the application of penalty pricing* to [cardholders'] accounts") (emphasis added).

makes a late payment" because, in that case, "the circumstances of the increase are specified in advance in the account agreement." 72 Fed. Reg. at 33,009. Even taken in isolation, the statement is, at most, ambiguous, because it does not indicate whether the hypothetical account agreement provides a specific rate that would automatically apply in the event of a default or, as in Chase's cardholder agreement, allows the creditor discretion to set the new rate somewhere within a wide range. In context, however, there is no ambiguity. The example is part of the proposed rule's discussion of Comment 9(c)-1, which provides that "no change-in-terms notice is required if the *specific* change is set forth initially by the creditor in the account-opening disclosures." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 (emphasis added). The example thus necessarily sets forth an example of a disclosure where the *specific* default rate is provided in advance. Indeed, far from reading Regulation Z as requiring no notice, the staff's rulemaking record again reiterates that notice is required under the pre-amendment rule, stating that "if an interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance." 72 Fed. Reg. at 33,009.

III. The Views of Agency Counsel, as Expressed in Legal Briefs, Are Not Worthy of Deference in This Case.

Despite the clarity of the requirement in the rules and supporting commentary that lenders notify cardholders of a change in "any term required to be disclosed" unless the "specific change" has been disclosed previously, agency counsel in two recent briefs have taken the position that lenders are required to disclose an APR increase only when they amend the text of the underlying cardholder agreements and, even then, only

when the original agreements did not disclose the possibility that such an amendment might occur. Agency counsel proposes that the possibility of reading of Regulation Z in this way demonstrates an ambiguity in the regulation's language, and therefore that this Court's decision in *Auer*, 519 U.S. 452, requires the Court to adopt the position taken in the briefs. But although this Court in *Auer* deferred to an agency's brief "in the circumstances of [that] case," *Id.* at 462, it did not create a blanket rule requiring deference to every agency brief that interprets a regulation. Rather, the Court in *Auer* deferred only after determining that there was reason to believe that the views in the agency's brief were reliable—in other words, that the brief gave "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.*

Although the circumstances in *Auer* counseled for deference to the agency's views, the same cannot be said about this case for three reasons. First, unlike *Auer*, in which the Court held that the agency's interpretation "comfortably bears" the language of the regulation, *Id.* at 461, the agency counsel's argument here flies in the face of Regulation Z's clear requirement that, "if a periodic rate or other finance charge is increased because of the consumer's delinquency or default[,] *the notice shall be given* ... before the effective date of the change." 12 C.F.R. § 226.9(c)(1) (emphasis added). Second, the Board has itself made the policy judgment that the staff's official views should be expressed in a centralized and deliberative way through the Official Staff Commentary rather than through litigation briefs, and deference to agency counsel's ad hoc policy views would directly contravene the Board's considered judgment on that point. Third, agency counsel's position demonstrates that it did not rely on the kinds of special expertise or knowledge

about the purposes of Regulation Z to which this Court would be justified in deferring. On the contrary, the Board has itself concluded that the result it argues for in its briefs would undermine the purposes of Regulation Z by misleading consumers about the interest rate that applies to their loans. This Court's decisions do not require it to defer to agency counsel's simple textual interpretation of regulatory language, especially where to do so would compel a result contrary to the plain meaning of that language and to the regulation's policy objectives.

A. The Agency's Interpretation Is Inconsistent with Regulation Z's Plain Language.

As an initial step, "interpretation of TILA and Regulation Z demands an examination of their express language." *Ford Motor Credit Co.*, 444 U.S. at 560. Only "absent a clear expression" in the statutory and regulatory language is it "appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments." *Id.*; *see Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). As explained above, Regulation Z is clear that notice is required when a lender raises a loan's APR as a result of default. There is thus no reason to defer to agency counsel's opinion about the meaning of the regulatory language. *See Christensen*, 529 U.S. at 588; *cf. Consol. Bank v. U.S. Dept. of Treasury*, 118 F.3d 1461, 1465 (11th Cir. 1997) (rejecting Federal Reserve's interpretation of TILA where the statute was clear).

B. Under the Board's Own Rules, Legal Briefs Are Not Entitled to Deference.

Unlike the agency in *Auer*, the Board here has set forth by regulation the circumstances under which the views of its staff should be considered official expressions of agency policy. Under the Board's own standards,

the briefs on which Chase relies do not constitute official expressions of the staff's views and, by the terms of Regulation Z itself, are not entitled to any deference.

The Board has defined its Official Staff Commentary, enacted through notice and comment rulemaking, as the mechanism through which it issues "official staff interpretations" of Regulation Z. 12 C.F.R. pt. 226, app. C; *see* 12 C.F.R. § 226.1(d)(8). That the commentary is the exclusive source of authorized staff opinion is reinforced by the commentary itself, which specifies that it "is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z." 12 C.F.R. pt. 226, supp. I, cmt. I-1. The commentary provides that new interpretations "will be incorporated in this commentary following publication in the Federal Register" and that "[n]o official staff interpretations are expected to be issued other than by means of this commentary." *Id.*, cmt. I-2.

The Board's designation of the commentary as the sole source of official staff interpretations was a deliberate policy choice. Before the commentary was established, the Board's staff formulated policy in the form of letters issued in response to specific questions by regulated entities. That approach yielded "more than 1,500 separate opinions," each of which was "limited to [specific] facts." *Truth in Lending*, 46 Fed. Reg. 50,288, 50,288 (Oct. 9, 1981); *see* Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, And Nothing But The Truth*, 25 Yale J. on Reg. 181, 204 n.117 (2008). The accumulation of opinions subjected the banking industry to divergent and sometimes conflicting interpretations of law, and required regulated entities to divine their legal responsibilities by sifting through unpublished sources of information that were often not readily

available. *See Truth in Lending*, 45 Fed. Reg. 80,648, 80,648-80,650 (Dec. 5, 1980).

In direct response to that problem, the Board in 1981 amended Regulation Z to establish the Official Staff Commentary. 46 Fed. Reg. 50,288. The purpose of the commentary was to centralize and codify the staff's interpretation of Regulation Z, so that its guidance might be available "for use by the widest possible audience" and would not "overburden[] the industry with excessive detail and multiple research sources." *Id.* Because the Commentary was created to be the exclusive source for "official" interpretations, its adoption "entirely superseded" all previous interpretations. 12 C.F.R. pt. 226, supp. I, cmt. I-1. Moreover, to avoid reoccurrence of the problem, the Board specified that responses to "new questions" and "any additional staff interpretations" would be issued solely through "[p]eriodic updates" to the commentary. 46 Fed. Reg. at 50,288.

Deference to agency counsel's ad hoc interpretations, despite Regulation Z's provision to the contrary, would reinstitute the problems that the Board intended the Official Staff Commentary to address, subjecting Chase and other lenders to interpretations filed in unpublished briefs in courthouses across the country and undermining TILA's "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Ford Motor Credit*, 444 U.S. at 568. Moreover, deference to unofficial agency opinions could not easily be cabined to litigation briefs. Indeed, Chase also asks this Court to defer to fragmentary statements contained in the "more than 1,000 pages" (Pet Br. 8) of material that the agency has published during six years of rulemaking. If this Court accepts that position, it would force both the agency and litigants in future cases to comb through those and countless additional pages contained in correspondence, publications,

and the agency's website to determine the agency's position, and would thus threaten to again "overburden[]" the industry with the excessive detail and multiple, inaccessible research sources that led the Board to adopt the Official Staff Commentary in the first place.

Deference to agency legal briefs would also contravene the Board's policy judgment in another way, by circumventing the process of notice-and-comment rulemaking that the Board has chosen to require for the development of official staff opinions. 12 C.F.R. pt. 226, supp. I, cmt. I-2 ("Interpretations that are adopted will be incorporated in this commentary following publication in the Federal Register."). To be sure, this Court has not required agencies to use notice-and-comment rulemaking as a means to comment on their own regulations, and has held in the context of agency interpretation of statutes that the absence of such rulemaking "does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart*, 535 U.S. at 221. But the Court also customarily gives greater weight to agency views that have been subjected to the reasoned consideration of the notice-and-comment process. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). This Court in *Christensen*, for example, declined to defer to an agency's opinion and amicus brief, on the ground that informal interpretations—that is, those interpretations (like those contained in legal briefs) made outside the strictures of the Administrative Procedure Act, *see* 5 U.S.C. § 553 (mandating notice, comment, and consideration in agency rulemaking)—"lack the force of law." *Christensen*, 529 U.S. at 587.

The Board's considered policy judgment to subject its staff's official policy views to the rigors of notice and comment is entitled to respect. Indeed, the Board's decision to require formal rulemaking was itself adopted through the notice-and-comment rulemaking process.

See 46 Fed. Reg. 50,288. To accept the agency's legal briefs as authoritative expressions of agency opinion would paradoxically allow agency counsel to usurp the Board's own judgment about the level of deliberation necessary for official decisions regarding agency policy. As this Court has made clear, however, agencies cannot, "under the guise of interpreting a regulation, ... create a de facto new regulation" that circumvents or contradicts a rule enacted through notice and comment rulemaking. *Christensen*, 529 U.S. at 588.

C. The Agency's Briefs Do Not Reflect a "Considered Judgment on the Matter in Question."

1. The question in *Auer* involved interpretation of a rule providing that an employee is exempt from overtime pay under the Fair Labor Standards Act only when the employee's salary "is not subject to reduction because of variations in the quality or quantity of the work performed." 519 U.S. at 455 (internal quotation marks omitted). The plaintiff police sergeants argued that an employee's salary should be considered "subject to reduction"—and thus that the employee should be entitled to overtime pay—"whenever there exists a theoretical possibility of such deductions." *Id.* at 459. In an amicus brief requested by the Court, however, the Secretary of Labor interpreted the rule as providing that a salary should be considered "subject to reduction" only when the policy permits reductions in salary "as a practical matter." *Id.* at 461. This Court gave substantial weight to the agency's views. The Court held that, "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Id.* The Court concluded that this deferential standard was "easily met," noting that the phrase "'subject to' comfortably bears the meaning the Secre-

tary assigns" and had the additional common-sense effect of "avoid[ing] the imposition of massive and unanticipated overtime liability ... in situations in which a vague or broadly worded policy is nominally applicable to a whole range of personnel but is not 'significantly likely' to be invoked against salaried employees." *Id.*

As this Court explained in *Gonzalez v. Oregon*, the critical consideration in *Auer* was that the Secretary's position "reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act." 546 U.S. 243, 256-57 (2006). Accordingly, this Court has applied *Auer* deference in cases where the agency relied on expertise that renders it "uniquely qualified" to interpret the regulatory question and therefore the agency's position appears to "reflect the agency's fair and considered judgment" on that question. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 883-84 (2000); *see also Mead*, 533 U.S. at 228 n.7 (2001) ("[C]ourts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position ... ."); *Barnhart*, 535 U.S. at 222 (affording deference to an Agency's interpretation of a statute in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"). Conversely, this Court has declined to extend deference when an agency's acknowledged areas of "expertise and experience" do not inform "how to decide [an] issue." *Gonzalez*, 546 U.S. at 257.

Nothing in the agency's briefs here suggests that the agency exercised its experience or expertise to make an informed policy decision that notice of an increased APR

should be denied to consumers. The government does not dispute that its reading of § 226.9's notice requirement would subject cardholders to a rate of which they are unaware. And the government suggests no reason why reading the regulations to require such a result would further the policies behind TILA—a statute with the central purpose of requiring disclosure of a loan's APR. Because consideration of policy and the purpose of Regulation Z are conspicuously absent from agency counsel's brief, there is good "reason to suspect that the [agency's] interpretation" of §226.9 "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462. The brief is therefore unworthy of *Auer* deference.[6]

Indeed, far from endorsing the position in its brief as a matter of policy, the Board has itself taken the position that undisclosed APR increases harm consumers by preventing them from shopping around for a lower-priced loan. The rulemaking preceding the 2009 amendments is replete with the Board staff's conclusions that prior no-

---

[6] The agency's omission is particularly glaring when compared to other Board amicus briefs submitted to the lower courts and this Court interpreting TILA and Regulation Z. *See, e.g.*, Brief for the United States as Amicus Curiae, *Household Credit Service v. Pfenning*, No. 02-857 (S. Ct. May 2003); Brief for the Board of Governors of the Federal Reserve System as Amicus Curie, *Consolidated Bank v. Office of the Comptroller of the Currency*, No. 95-4831 (11th Cir. Feb. 28, 1996); Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae, *Aronson v. Peoples Natural Gas Co.*, No. 99-3000 (3d Cir. December 4, 1998). In those briefs, the Board's interpretations relied on textual analysis supplemented and informed by its particular expertise, including knowledge of TILA's statutory objectives, analysis of rulemaking history to establish regulatory intent, exploration of the practical implications of a rule on consumers and creditors, and considerations of ease and efficiency in regulatory administration.

tice is essential to achieving TILA's purpose. In the 2007 proposed rule, for example, the staff noted complaints by borrowers and consumer advocates that consumers "are surprised by changes to the terms of their accounts" because they "do not remember the information regarding those changes that was contained in the account opening disclosures." 72 Fed. Reg. at 33,009. The staff also noted comments that "consumers are not aware when they have triggered rate increases, for example by paying late, and thus are unaware that it might be in their best interest to shop for alternative financing before the rate increase takes effect." *Id.* These comments were supported by the staff's own consumer testing, which showed that many consumers did not notice the information about default rates in their initial disclosures, in part because the default rate was not required to be disclosed alongside the initial APR. *Id.*

Based on this evidence, the staff acknowledged the importance of notice to TILA's purpose of "improv[ing] consumers' awareness about changes in their account terms" and "consumers' ability to shop for alternative financing before such account terms become effective." *Id.* It concluded that "consumers should have sufficient time, following the notice and before the change becomes effective, to change the usage of their plan or to pursue alternative means of financing their purchases, such as using another credit card, utilizing a home-equity line or installment loan, or shopping for a new credit card," *id.* at 33,010—in other words, a policy view totally incompatible with the view of the rules in the government's briefs here. Based on this analysis, the agency proposed and adopted new rules increasing both the 15-day advance notice and contemporaneous notice requirements to 45 days, concluding that "30 days could be inadequate" for consumers who "want[] to shop for another credit

card, apply for, open, and transfer a balance from an existing card to a new card." *Id.*

Neither Chase nor the agency's legal counsel give any contrary reason why allowing increases in APR without notice is consistent with, much less furthers, the purposes of TILA. Chase contends only that default-based rate increases are common in the credit card industry, but McCoy is not arguing that creditors are prohibited from using such pricing policies. Under McCoy's understanding of Regulation Z, creditors could still reserve the right to raise rates consistently with § 226.9(c) as long as they provided notice of the rate increase. There is no legitimate reason for the Board to give creditors the right to increase rates without providing notice. Indeed, the only interest a creditor has in denying borrowers this information is the hope that borrowers will accumulate debt that, had they known the applicable rate, they would have chosen not to incur either by refraining from making purchases or by switching to a lower-priced loan. The practice of misleading borrowers into unknowingly acquiring debt at a high interest rate is the precise practice that Congress designed TILA to prevent. *See* 15 U.S.C. § 1601(a).

2. Rather than basing its call for deference on the Board's expertise or policy judgments—the reasons for which Congress granted the Board interpretive authority in the first place—the agency's counsel ask the Court to defer based only on their reading of the ordinary English meaning of Regulation Z's language. In effect, the government reads *Auer* deference as based on a sort of ex post facto legislative history, in which, as the author of the regulation, the agency is the best one to ask what it had in mind at the time the regulation was written. Even if that form of deference were legitimate, it would make no sense here. The regulatory provisions at issue were adopted in 1981, 72 Fed. Reg. at 32,948, and it is

therefore unrealistic to believe that the agency's counsel has any special knowledge of their meaning. *See Gonzalez*, 546 U.S. at 257-58 (rejecting *Auer* deference where the agency was interpreting a decades-old rule and its interpretation ran "counter to the intent at the time of the regulation's promulgation") (internal quotation omitted).

In any event, this Court does not defer to agency briefs about the meaning of a regulation because the agency has special knowledge about what it had in mind at the time the regulation was drafted. That view of the law would give agencies a perverse incentive to issue vague regulations, saving the more difficult policy decisions for interpretation in individual cases—where the agencies could make policy through amicus briefs that courts would apply retroactively. *See Mead*, 533 U.S. at 246 (Scalia, J., dissenting). Agencies would thus have "high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect." *Id.* That result would "disserve[] the very purpose behind the delegation of lawmaking power to administrative agencies, which is to "resol[ve] ... ambiguity in a statutory text." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (citations omitted); *see also* John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 943 (2004) (arguing that a broad application of *Auer* deference permits agencies to "make an end run around the boundaries drawn by *Mead*"). To allow such broad interpretive power would also give greater deference to unofficial statements of agency opinions than to formal agency decisions (including here both regulations and official, contemporaneous explanations of them) adopted pursuant to notice-and-comment rulemaking. There is no reason, however, to assume that Congress in granting interpre-

tive authority to the Board intended that result. *Cf. Christensen*, 529 U.S. at 591 (Scalia, J., concurring) ("What we said in a case involving an agency's interpretation of its own regulations applies equally ... to an agency's interpretation of its governing statute[.]").[7]

This Court should not defer to a reading of Regulation Z that the agency has itself concluded is contrary to the purposes of the statute. Whether the agency's reading of Regulation Z is compelled by its text is a question that falls well within the Court's traditional "role as interpreter of the laws." *Gonzalez*, 546 U.S. at 255. In the absence of any contrary exercise of agency discretion or policy judgment that warrants deference, this Court should construe the rules in the way that accords best with the rules' language, context, and purpose. As explained above, the only reasonable reading of the rules under these criteria is that they prohibit creditors from raising a cardholder's APR without providing notice that the rate has increased.

---

[7] In part for these reasons, lower courts have rejected agency arguments that *Auer* demands a higher level of deference to agency interpretations of regulations than to agency interpretations in other contexts. *See, e.g., Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 (9th Cir. 2009) (cautioning that an overly broad reading of *Auer* would permit agencies to "engage in an end-run around notice-and-comment rulemaking"); *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) ("Briefs certainly don't have the 'force of law.'") (quoting *Christensen*, 529 U.S. at 587); *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 222 n.8 (2d Cir. 2006) (suggesting that *Skidmore* deference applies to an agency's amicus brief's interpretation of its regulation because *Auer* had been "seemingly undercut by *Christensen*"); *cf. Houston Police Officers' Union v. City of Houston*, 330 F.3d 298, 305 (5th Cir. 2003) (questioning whether an agency's amicus brief's interpretation is "sufficiently authoritative to merit *Chevron* deference").

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

GREGORY A. BECK
COUNSEL OF RECORD
Deepak Gupta
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Barry L. Kramer
12428 Promontory Road
Los Angeles, CA 90049
(310) 440-9761

Counsel for Respondent

October 2010

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 17 2010
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,
Petitioner,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

642

RULE 29.6 STATEMENT

Petitioner's Rule 29.6 disclosures appear in its opening brief (at ii). There are no changes to those disclosures.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES v

ARGUMENT 1

I. DEFERENCE TO THE VIEWS EXPRESSED IN THE BOARD'S AMICUS BRIEFS IS WARRANTED 3

A. The Board's Views Do Not Conflict With The Plain Language Of Regulation Z 3

B. Deference Is Not Limited To The Official Staff Commentary 4

C. Board Interpretations Of Regulation Z Need Not Be The Product Of Notice-And-Comment Rulemaking 5

D. The Rationales For Deference Are Present Here 6

II. THE REGULATION AND COMMENTARY, AS WELL AS THE BOARD'S INTERPRETATIONS OF BOTH, CONFIRM THE NINTH CIRCUIT'S ERROR 10

A. McCoy's Plain-Text Argument Ignores The Key Regulatory Language 11

B. The Commentary Supports The Board's And Chase's Interpretation 15

C. The Board's Statements During Its Rulemaking Further Confirm Chase's Construction 19

TABLE OF CONTENTS—Continued

Page

D. McCoy's "Purpose" Arguments Lack Merit 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page(s)

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 16

Auer v. *Robbins*, 519 U.S. 452 (1997) 3, 5, 10

Barnhart v. *Walton*, 535 U.S. 212 (2002) 6

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 5

Christensen v. *Harris County*, 529 U.S. 576 (2000) 3, 6

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 4, 7, 9, 22

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 7, 8

Kennedy v. *Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009) 5, 10

Keys v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003) 5

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 5, 10

Martin v. *Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991) 6, 7, 9

Shaner v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009) 4, 5

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 4

Swanson v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied with op.*, 563 F.3d 634 (7th Cir. 2009) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Swanson v. *Bank of America, N.A.*, 563 F.3d 634 (7th Cir. 2009) 15

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 6

REGULATIONS

Regulation Z, 12 C.F.R. pt. 226 1

12 C.F.R.
§ 226.5 (2004) 13
§ 226.5b (2004) 19
§ 226.6 (2004) 11-14, 18
§ 226.7 (2004) 12
§ 226.9 (2004) 11-15, 20

12 C.F.R. pt. 226, supp. I
cmt. ¶ 6(a)(2)-2 18
cmt. ¶ 6(a)(2)-9 12
cmt. ¶ 6(a)(2)-11 ..... 11, 17, 19
cmt. ¶ 7(d)-2 12
cmt. ¶ 9(c)-1 ..... 12, 16-19
cmt. ¶ 9(c)(1)-2 16
cmt. ¶ 9(c)(1)-3 ..... 14, 15

Truth in Lending, 74 Fed. Reg. 5,244 (Jan. 29, 2009) (final rule) 20

Truth in Lending, 72 Fed. Reg. 32,948 (June 14, 2007) (proposed rule) 12, 20, 21

Truth in Lending, 45 Fed. Reg. 80,648 (Dec. 5, 1980) (proposed rule) 8

IN THE

Supreme Court of the United States

No. 09-329

CHASE BANK USA, N.A.,

Petitioner,

v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ARGUMENT

This case concerns the meaning of the Federal Reserve Board's Regulation Z, 12 C.F.R. pt. 226. In the last year, the author of the regulation, the Board, has explained, in briefs filed at the invitation of federal courts, its long-held interpretation of the regulation. According to the Board, Regulation Z means just what petitioner Chase Bank USA has argued and the industry as a whole has always understood. The Board's position should be dispositive of the question presented, because under this Court's precedent an agency's interpretation of its own regulation is entitled to substantial deference. In the present context—the Board's

construction of a technical classification in Regulation Z—that deference is near if not at its apex. Respondent James McCoy asks for deference to be denied, asserting that the regulation is unambiguous and that deference should be limited to the Board staff's commentary, to Board views subject to a formal notice-and-comment process, or to Board positions based upon explicitly described policy bases. No authority supports any of these contentions and none has merit.

Even absent deference, the Board's and Chase's reading of Regulation Z is correct. It is supported by the regulation's text, the Board staff's commentary, and the Board's repeated statements in rulemaking proceedings over the past six years. McCoy's contrary arguments ignore critical language from both the regulation and the commentary. But even if his arguments were credited, at best they demonstrate that the regulation was ambiguous. And that conclusion leads back to the starting point for analysis—deference to the Board's resolution of that ambiguity is appropriate.[1]

---

[1] McCoy's brief repeatedly mischaracterizes both the Board's interpretation and card issuers' practices as to notice of rate increases resulting from cardholder defaults. For example, McCoy states (Br. 43) that the Board's interpretation allows issuers "to increase rates without providing notice." In reality, under the Board's view, issuers had to disclose—before any rate increase could occur—each triggering event for an increase and the corresponding maximum penalty rate. *See* U.S. Br. App. 6a. Issuers also had to notify cardholders, in the appropriate periodic statement, about increases that occurred pursuant to those previously disclosed terms. *See id.* at 7a. McCoy's repeated assertion that Chase increases rates without any notice is thus simply false.

I. DEFERENCE TO THE VIEWS EXPRESSED IN THE BOARD'S AMICUS BRIEFS IS WARRANTED

McCoy acknowledges (*e.g.*, Br. 33-34) that the Board, in responding to invitations from this Court and the First Circuit, has explained in recent amicus briefs that it has consistently interpreted the applicable version of Regulation Z just as Chase does, *i.e.*, not to require notice of a change in terms in the circumstances here. McCoy also acknowledges (Br. 12) that "the Board has substantial discretion to interpret TILA, and that this Court in *Auer* [v. *Robbins*, 519 U.S. 452 (1997),] granted a high level of deference to an agency amicus brief that interpreted the agency's own regulations." And McCoy does not dispute that here, as in *Auer*, the relevant interpretation is not "advanced by an agency seeking to defend past agency action against attack." *Id.* at 462, *quoted in* Pet. Br. 29. McCoy nonetheless argues that deference to the Board's interpretation of Regulation Z, as expressed in the amicus briefs, is unwarranted. That argument is meritless.

A. The Board's Views Do Not Conflict With The Plain Language Of Regulation Z

McCoy first contends (Br. 35) that deference is improper because the Board's construction is foreclosed by Regulation Z's plain text. *Auer* deference is indeed unwarranted if a regulation's text is clear. *See, e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000). But there is no serious argument here that Regulation Z unambiguously requires McCoy's reading. In fact, as explained below, *see* Part II.A, the regulation's plain text, if anything, supports the Board's and Chase's interpretation. No court—not even the panel majority below—has endorsed McCoy's contention that the regulation unambiguously supports his position. *See*

Pet. App. 4a ("Regulation Z is ambiguous."); *accord Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488, 493 (1st Cir. 2009); *Swanson* v. *Bank of Am., N.A.*, 559 F.3d 653, 655, 656 (7th Cir. 2009) (subsequent history omitted). The division on the question presented between the panel majority below on one hand, and every other judge to have considered the issue on the other, confirms that the regulation is at minimum ambiguous. *See Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996).

B. Deference Is Not Limited To The Official Staff Commentary

McCoy next seeks (Br. 35-37) to deny deference to the Board on the ground that under Regulation Z, the staff of the Board's Division of Consumer and Community Affairs issues official interpretations of the regulation only in the Official Staff Commentary. But the views in the amicus briefs are not a staff interpretation. They are the views of the Board itself. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980) (noting the distinction). Nothing in Regulation Z, or any other authority, restricts the Board's ability to provide its *own* authoritative interpretations, whether through amicus briefs, preambles to its regulations, or in other ways. Nor does McCoy contend otherwise. His discussion of the Commentary's history (Br. 36-37) is therefore simply irrelevant.

McCoy seeks to make much the same point by persistently referring to the views in the Board's amicus briefs as those of "agency counsel" (*e.g.*, Br. 33-35). But again, the briefs express the views of the Board itself, not of its attorneys. As the First Circuit explained in *Shaner*, the court "asked the Board for *its* views on its own pre-amendment regulations and *it* has submitted

them through an amicus brief." 587 F.3d at 491 (emphases added). The Board's *Shaner* amicus brief also makes this clear. *See* U.S. Br. App. 2a ("[T]he Board has interpreted the applicable provisions of Regulation Z...."), 19a ("It is the Board's position...."), 1a ("Brief for the Board"). The agency briefs in *Auer* and later cases were likewise written by "agency counsel"—including, as here, the Solicitor General—yet this Court granted deference to the agency's views.

C. Board Interpretations Of Regulation Z Need Not Be The Product Of Notice-And-Comment Rulemaking

McCoy next seeks (Br. 38-39) to deny deference to the Board because its views are expressed in briefs rather than following formal notice-and-comment rulemaking. That argument cannot be squared with *Auer* or other cases in which this Court (unanimously) deferred to agency views in amicus briefs. *See Auer*, 519 U.S. at 461; *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 (2009); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007).[2]

The cases McCoy invokes—which all predate *Kennedy* and *Long Island Care*—are inapposite. The relevant portions addressed deference to an agency's *statutory* interpretation, *see Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), not an interpretation of the agency's regulations. The sentence in *Christensen* from which McCoy excerpts his "lack

---

[2] *Kennedy* and *Long Island Care* refute the suggestion, made in the lower-court decisions McCoy cites (Br. 45 n.7), that "there is little left of *Auer*," *Keys* v. *Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003).

the force of law" quote (Br. 38) makes this clear, expressly referring to "*Chevron*-style deference." 529 U.S. at 587.[3] *United States* v. *Mead Corp.* similarly concerned *Chevron* deference. *See* 533 U.S. 218, 226 (2001) (review granted "to consider the limits of *Chevron* deference"). So did *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002) ("question before us is ... the Agency's interpretation of the statute").[4] To Chase's knowledge this Court has never declined *Auer* deference to views expressed in an agency's brief on the ground that the brief was not the product of a formal notice-and-comment procedure.

D. The Rationales For Deference Are Present Here

McCoy argues finally (Br. 39-45) that the rationales for deferring to agencies' interpretations of their own regulations do not apply here. That is incorrect.

1. As this Court has explained, courts defer to an agency's construction of its regulations because Congress has given the agency interpretive power. *See Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[T]he power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."). That rationale applies fully here. Indeed, in explaining this rationale the Court in *Martin* cited its earlier deci-

---

[3] *Christensen* separately declined *Auer* deference, but not because of a lack of notice-and-comment rulemaking. Rather, the Court deemed the regulation unambiguous. *See* 529 U.S. at 588.

[4] As McCoy acknowledges (Br. 38), *Barnhart* confirms that even in the *Chevron* context, *Christensen* did not make rulemaking a prerequisite for deference. *See* 535 U.S. at 221-222.

sion in *Ford Motor Credit* about deference to the Board under the Truth in Lending Act (TILA). *See id.* And in *Ford Motor Credit*, the Court observed that Congress "delegated expansive authority to the ... Board to elaborate and expand the [statutory] framework." 444 U.S. at 559-560. The power to interpret Regulation Z definitively "is a component of" that broad delegation. *Martin*, 499 U.S. at 151.

McCoy's contrary argument (Br. 40) relies primarily on *Gonzales* v. *Oregon*, 546 U.S. 243 (2006). But *Gonzales* adopted the same view as the cases just discussed. It explained that one reason for deferring in *Auer* was that the agency's "regulations gave specificity to a statutory scheme the [agency] was charged with enforcing." *Id.* at 256. The same is true here.

As McCoy notes (Br. 40), *Gonzales* elaborated a second ground for deference in *Auer*. The agency's "regulations ... reflected the considerable experience and expertise the [agency] had acquired over time with respect to the complexities of the" statute. 546 U.S. at 256. That does not help McCoy, however, because Regulation Z unquestionably reflects the Board's "experience and expertise," acquired over time, regarding TILA's "complexities." *Id.* In fact, it was TILA's complex, "highly technical" nature that this Court pointed to in *Ford Motor Credit* as a primary reason to defer to Board interpretations. 444 U.S. at 566.

McCoy also states (Br. 40) that *Gonzales* declined *Auer* deference because the agency's expertise did not inform resolution of the pertinent issue. In reality, the Court withheld *Auer* deference because "the underlying regulation does little more than restate ... the statute," and therefore "the question here is not the meaning of the regulation but the meaning of the statute."

546 U.S. at 257. That is not the situation here. *Gonzales*' holding, then, like its reasoning, does not support McCoy.[5]

2. McCoy next argues (Br. 41) that deference is inappropriate because policy considerations are supposedly absent from the Board's amicus briefs. That is both factually and legally incorrect.

As a factual matter, policy considerations are not absent from the Board's briefs. For example, the *Shaner* amicus brief explains that the Board interprets Regulation Z not to have required notice of a change in terms in the circumstances of this case because the rate increases were "the implementation of terms already disclosed." U.S. Br. App. 6a. In the Board's view, in other words, cardholders like McCoy received sufficient notice in their initial disclosures. This is consistent with views the Board stated in modifying Regulation Z in 1980. It explained then that the regulation did not emphasize "disclosures relating to events after the initial credit choice" because, "[i]n the Board's view, the primary goals of [TILA] are not particularly enhanced by regulatory provisions relating to changes in terms on outstanding obligations and on the effects of the failure to comply with the terms of the obligation." *Truth in Lending*, 45 Fed. Reg. 80,648, 80,649 (Dec. 5, 1980) (proposed rule). That judgment, regarding how much disclosure is optimal, is steeped in policy and expertise. Indeed, it is the very policy judgment that this Court flagged in *Ford Motor Credit* as quintessentially for the

---

[5] A second rationale for declining *Auer* deference in *Gonzales* was that the agency's authority to issue the relevant interpretation was granted after the regulation's promulgation. *See* 546 U.S. at 257-258. Again, that is not true here.

Board. *See* 444 U.S. at 568-569 ("*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations[.]' ... And striking the appropriate balance is an empirical process that ... [a]dministrative agencies are simply better suited than courts to engage in[.]").

The Board also noted in the *Shaner* amicus brief that it was "aware that credit card companies frequently choose to impose less than the maximum rate increase permitted under the contract terms." U.S. Br. App. 15a-16a. The Board explained that it "has never viewed that exercise of discretion in the consumer's favor" to require a notice of a change in terms because its policy judgment is that "consumers need not be informed in advance of changes that are to their advantage because those changes obviously do not put them at added risk." *Id.* at 16a.

More fundamentally, there is no merit to McCoy's legal contention that *Auer* deference is warranted only if the agency sufficiently discusses the policy considerations underlying its regulatory interpretation. As explained, deference is granted because Congress has decided that gaps in a regulation are to be filled by the agency. *See Martin*, 499 U.S. at 151. There is no basis to hold that this applies to "policy" gaps but not others. Certainly nothing about Congress's delegation of "expansive [interpretive] authority" to the Board, *Ford Motor Credit*, 444 U.S. at 559, suggests anything like McCoy's proposed limitation. McCoy notably cites no case in which deference to an agency's interpretation of its regulation was refused because the agency did not discuss the policy that informed its interpretation or because the interpretation involved "only ... the[] reading of the [regulation's] ordinary English meaning." Resp. Br. 43.

More generally, this Court has repeatedly granted deference even where the case for doing so was less compelling than here. For example, the Court has deferred where an agency actually changed its interpretation of a regulation. *See Kennedy*, 129 S. Ct. at 872 n.7; *Long Island Care*, 551 U.S. at 171. The Board, in contrast, has interpreted its regulation consistently, *see* U.S. Br. App. 6a, and addressed policy concerns by changing the regulation itself (through formal proceedings). It should not be penalized for doing so, in the form of lost deference. To the contrary, the extensive attention the Board paid to these issues in conducting the rulemaking confirms the propriety of giving deference here, by demonstrating that the Board's interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; *see also* Resp. Br. 5 (rulemaking involved "a comprehensive review" and "extensive record"). Because it does, the Board's interpretation is "controlling." *Auer*, 519 U.S. at 461.

II. The Regulation And Commentary, As Well As The Board's Interpretations Of Both, Confirm The Ninth Circuit's Error

The views in the Board's amicus briefs, combined with this Court's admonition that deference to the Board's interpretations of Regulation Z is particularly appropriate, *see* Pet. Br. 26, provide ample grounds to reverse. But the text of Regulation Z and the Commentary, and the Board's interpretation of both in rulemaking proceedings, lead to the same result.

A. McCoy's Plain-Text Argument Ignores The Key Regulatory Language

1. McCoy's assertion (Br. 13-15) that Regulation Z unambiguously required notice of a change in terms in cases like this ignores the critical regulatory text. As McCoy acknowledges (Br. 13), Regulation Z required such notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1).[6] The critical question, then, is whether a "term" that § 226.6 required a card issuer to disclose at account-opening "is changed" in cases like this.

McCoy glides over this central question, baldly asserting (Br. 13) that the answer is yes because "[o]ne of the terms that § 226.6 requires to be disclosed is the loan's APR." McCoy quotes no language in support, and § 226.6 in fact required "disclosure of each periodic rate that *may* be used to compute the finance charge, ... and the corresponding annual percentage rate." 12 C.F.R. § 226.6(a)(2) (emphasis added). In other words, § 226.6 required disclosure of both the initial rate (that is, the rate in effect at the time of the initial disclosures) and the other rates that "may be used." *Id.* And the Commentary was clear that one type of periodic rate that "may be used," and which an issuer therefore must disclose under § 226.6(a)(2), is a default rate. *See id.* pt. 226, supp. I. cmt. ¶ 6(a)(2)-11, *quoted in* Pet. Br. 8. If a cardholder defaulted, and the issuer applied a rate at or below the disclosed maximum, there was no change to what was initially disclosed, *i.e.*, no change to the rates that "may be used." Rather, the issuer im-

---

[6] All citations herein to Regulation Z are to the 2004 version.

plemented the default-rate term by applying a previously disclosed rate.[7]

The error of McCoy's reading of §§ 226.6(a) and 226.9(c) to require a change-in-terms notice "whenever a loan's APR is changed" (Br. 13) is clear from the irreconcilable conflict between that reading and the Commentary. Under McCoy's view, notice of a change in terms was required every time a variable rate on a credit card increased due to an increase in the index upon which that rate is based (*e.g.*, the prime rate). But the Commentary expressly states that no change-in-terms notice was required in that instance. *See* 12 C.F.R. pt. 226, supp. I cmts. ¶ 6(a)(2)-9, ¶ 9(c)-1. Nor was notice required in other circumstances where, to use McCoy's words (Br. 13), "a loan's APR is changed." *See* 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)-1 (providing two additional examples). Chase's and the Board's construction of §§ 226.6(a) and 226.9(c) is thus not only the most natural reading of the text of those provisions, but also the only reading that is consistent with the Commentary's construction of the change-in-terms requirement overall.

2. Lacking textual support for his position, McCoy (Br. 15) accuses Chase of arguing "that the phrase 'any term required to be disclosed under § 226.6' refers not to changes to the ... terms of the loan, but to

---

[7] The cardholder still received notice of the newly applicable rate, of course, notwithstanding McCoy's persistent suggestions to the contrary (*e.g.*, Br. 1). As Chase and the Board have explained, notice appeared on the periodic statement. *See* 12 C.F.R. § 226.7(d), (g); *id.* pt. 226, supp. I, cmt. ¶ 7(d)-2, *quoted in* Pet. Br. 11; *Truth in Lending*, 72 Fed. Reg. 32,948, 33,009 (June 14, 2007) (proposed rule).

changes to the terms of the [parties'] contract." To the contrary, as Chase's opening brief makes clear, the phrase in § 226.6(a)(2) means exactly what it says: the terms that must be disclosed initially under § 226.6, including the rates that "may be used." *See* Pet. Br. i, 8, 30. Hence, as explained, if a card issuer merely implements a default rate that it said in its initial disclosures "may be used," then the issuer has not changed the rates that "may be used," *i.e.*, has not changed any term required to be disclosed by § 226.6.

McCoy's loan-contract distinction also reflects an apparent misunderstanding of the subject matter of TILA disclosures. The terms under which card issuers extend credit are established by the contract governing the loan, *i.e.*, the card agreement. Thus, what McCoy labels the APR "loan" term is, in fact, the APR "contract" term. That is why Regulation Z disclosure requirements are grounded in the contract terms; the regulation states that disclosures shall "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c), *quoted in* Pet. Br. 8-9. McCoy simply ignores this point.

3. McCoy also seeks refuge (Br. 13) in the third and final sentence of § 226.9(c)(1). But that sentence, and the one preceding it, simply specified *when* card issuers had to send a change-in-terms notice if it was required by the section's first sentence. Specifically, the second sentence provided that "[t]he notice" required by the first sentence had to be sent "at least 15 days prior to the [change's] effective date." 12 C.F.R. § 226.9(c)(1). The third sentence then provided an exception to "[t]he 15-day timing requirement" for certain changes, including rate increases resulting from "delinquency or default." *Id.* Rather than 15 days, the tim-

ing requirement for a notice in this instance was merely "before the [change's] effective date." *Id.*

Through selective excerpting, McCoy asserts that this third sentence of § 226.9(c)(1) imposes a freestanding notice requirement applicable to all default-based rate increases. He renders the sentence as follows: "[I]f a periodic rate or other finance charge is increased because of the consumer's delinquency or default[,] *the notice shall be given* ... before the effective date of the change." Resp. Br. 13 (omission and alterations in original); *see also id.* at 2, 10, 17, 34. But the complete version shows that, as just explained, this third sentence only concerns timing and does not address whether change-in-terms notice was required in the first place. The complete sentence reads: "The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change." 12 C.F.R. § 226.9(c)(1). Thus, if, upon a cardholder's default or delinquency, the issuer determined to change any term required to be disclosed by § 226.6, *see, e.g.*, Pet. Br. 10, the last sentence of § 226.9(c)(1) provided that the issuer did not need to send the required change-in-terms notice 15 days in advance. The issuer instead needed to send the notice only before the new term's effective date.[8]

---

[8] The first sentence of § 226.9(c)(1) parallels—and is addressed by—Official Staff Comment 9(c), which concerns whether a change-in-terms notice is required. The second and third sentences of § 226.9(c)(1) parallel—and are addressed by—Comment 9(c)(1)-3, the "timing" comment that the Ninth Circuit majority

McCoy also points (Br. 14-15) to § 226.9(c)(2), which lists changes that did not require notice of a change in terms. The list includes changes resulting "from the consumer's default or delinquency (other than an increase in the periodic rate or other finance charge)." 12 C.F.R. § 226.9(c)(2). Contrary to McCoy's contention, that parenthetical exception did not mean that all rate increases that resulted from a default or delinquency would require a change-in-terms notice. Rather, it meant that *some* rate increases resulting from a default or delinquency (*e.g.*, new terms adopted pursuant to a reservation-of-rights provision) would require such notice. That is consistent with Chase's and the Board's position. *See* Pet. Br. 10; U.S. Br. 14-15.

In short, Regulation Z's text demonstrates that Chase's and the Board's reading is correct. At a minimum, the regulation does not unambiguously dictate McCoy's position, and therefore could not preclude *Auer* deference.

B. The Commentary Supports The Board's And Chase's Interpretation

McCoy's arguments regarding the Commentary are also infirm. McCoy (Br. 23-25) echoes the Ninth Circuit's view (*see* Pet. App. 4a) that Comment 9(c)(1)-3 mandated change-in-terms notice for all default-based rate increases. Like the Ninth Circuit, however, McCoy bases his argument on a distorted excerpt of the comment. *See Swanson* v. *Bank of Am., N.A.*, 563 F.3d 634, 636 (7th Cir. 2009) ("The majority in *McCoy* replaced with ellipses the language in comment [9(c)(1)-]3

---

misunderstood. *See* Pet. Br. 10 (quoting the comment), 22-23 (explaining the majority's error); *see also* U.S. Br. 3-4.

showing that it concerns timing of notice otherwise required."). The full version (*see* Pet. Br. 10; U.S. Br. 4) leaves no doubt that the comment—like the regulatory language it addresses, *see supra* n.8—does not establish a freestanding notice requirement, but instead addresses the timing of notice otherwise required. This is particularly clear from the comment's title, "Timing." *See* Pet. Br. 22; U.S. Br. App. 14a. McCoy ignores this point, even though this Court has relied on headings in interpreting a statute, deeming them proper "tools available for the resolution of a doubt" about statutory meaning, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (citing cases).[9]

Perhaps recognizing the weakness in his argument about Comment 9(c)(1)-3, McCoy retreats to the position (Br. 24) that the comment "need not stand on its own." But Comment 9(c)-1, which McCoy discusses next (Br. 25-30), does not support his position either. That comment obviates the need for a change-in-terms notice where "the specific change is set forth initially." 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)-1. As Chase explained (Br. 31), it initially informed cardholders of the "specific" defaults that could trigger penalty rates and the "specific" maximum rate that could result from each default. McCoy contends that more specificity was required, but this was precisely the level of specificity that the Commentary mandated: "If the initial

---

[9] McCoy's argument (Br. 20-21) that TILA forbids application of a default rate to all charges during the pertinent billing cycle, which McCoy calls "retroactive," suffers from the same flaw as his Comment 9(c)(1)-3 argument. His authority—Comment 9(c)(1)-2, another "Timing" comment, and its regulatory history—applies only *if* Regulation Z otherwise required change-in-terms notice. *See* 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)(1)-2.

rate may increase upon the occurrence of one or more *specific* events, such as late payment or an extension of credit that exceeds the credit limit, the creditor must disclose the initial rate and the increased penalty rate that *may* apply." 12 C.F.R. pt. 226, supp. I cmt. ¶ 6(a)(2)-11 (emphases added). McCoy's complaint boils down to dissatisfaction with Chase's retention of discretion to apply a default rate lower than the initially-disclosed maximum. *See, e.g.*, Resp. Br. 26. But "the agreement does not lack the requisite specificity merely because it allows the issuer to exercise discretion in the consumer's favor." U.S. Br. 16. That allowance is fully consistent with the Commentary.[10]

The examples in Comment 9(c)-1 further support Chase's position. McCoy asserts (Br. 29) that all three examples in which a change-in-terms notice was deemed unnecessary "involve[] circumstances where the cardholder can identify whether the higher rate applies and, if so, what that rate actually is." That is wrong. For instance, the third example is a rate increase caused by a consumer's failure to maintain a required savings-account balance. Contrary to McCoy's view (Br. 30), such a failure is closely analogous to a cardholder default like McCoy's—each makes continua-

---

[10] McCoy also offers no genuine answer to Chase's argument (Br. 28-29; *accord* U.S. Br. 16-17) that: (1) rate increases to below the disclosed maximum (as here) are substantively identical to increases to the maximum followed immediately by discretionary rate reductions, and (2) even under McCoy's reading of Regulation Z the latter situation did not trigger change-in-terms notice. McCoy responds only (Br. 27-28) that consumers could better compare interest rates under his reading. But the comparative difficulties he outlines apply equally to both scenarios just described. The two are indeed substantively identical.

tion of a specific rate contingent on specified conduct by the consumer (maintaining a certain balance or making timely payments). *See* U.S. Br. 12-13. And the Commentary does not state that the consumer must know the exact rate that would result from failing to maintain the required balance. *See* Pet. App. 31a-32a (Cudahy, J., dissenting). The example thus confirms that the specificity McCoy demands was not required.

Finally, McCoy is wrong in contending (Br. 28) that his position is helped by the one example in Comment 9(c)-1 of when notice *was* required. That example refers to rate increases under a reservation-of-rights clause. McCoy repeatedly seeks (Br. 11, 21, 25, 28) to equate such a clause with a default-rate term. But the two are quite different. A reservation-of-rights clause gives a card issuer unlimited discretion to change the terms of the card agreement, including interest-rate terms, meaning that the agreement does not notify cardholders about when (or if) any changes will be made. A default-rate provision, by contrast, does not authorize changes to the initially-disclosed terms, and the discretion it gives is circumscribed both as to the specific occurrences that can trigger a default rate (which are stated for cardholders in the card agreement) and as to the specific maximum default rate for each default (which is also stated in the agreement).

Regulation Z and its Commentary recognize this distinction (as McCoy himself does (Br. 4)). First, the Commentary to § 226.6(a)(2) differentiates between, on one hand, a "creditor's contract reservation to increase the rate ... that simply provides that the creditor reserves the right to raise its rates," 12 C.F.R. pt. 226, supp. I cmt. ¶ 6(a)(2)-2, and, on the other hand, a disclosure of an "initial rate and the penalty rate that may apply" "upon the occurrence of one or more specific

events," *id.* cmt. ¶ 6(a)(2)-11. Second, as to open-end home-equity loans, Regulation Z prohibits lenders from changing contract terms—*i.e.*, from including a reservation-of-rights clause, *see* 12 C.F.R. § 226.5b(f)(3)—but allows lenders to "provide in the initial agreement that specified changes will occur if a specified event takes place," *id.* § 226.5b(f)(3)(i). And Comment 9(c)-1, upon which McCoy relies, refers specifically to this § 226.5b(f) "limit" on lenders' ability to change home-equity plans. The Commentary thus provides no support for McCoy's argument. At most, it could only be considered ambiguous as to how "specifically" a change had to initially be set forth to dispense with the requirement of a change-in-terms notice. The Board is entitled to resolve any such ambiguity.

C. The Board's Statements During Its Rulemaking Further Confirm Chase's Construction

Although McCoy disputes (Br. 30-33) that the Board's rulemaking statements support Chase's position, he does not engage with most of Chase's arguments (Pet. Br. 32-38). He instead dwells on three points, none of which has merit.

First, relying on his mischaracterization of Chase's argument as resting on a distinction between loan terms and contract terms, McCoy discounts the rulemaking history on the ground that the Board did not specifically describe "the phrase 'change in terms required to be disclosed'" in § 226.9(c)(1) "to refer to the text of a contractual provision." Resp. Br. 31. This argument is untenable because, as discussed above, *see* pp. 12-13, its premise is wrong.

Second, McCoy disputes Chase's and the Board's point that his reading of Regulation Z would render su-

perfluous a "major" change intended to be accomplished by the amended regulation, and specifically by the new § 226.9(g). *See* Pet. Br. 25, 35-36; U.S. Br. 19; U.S. Br. App. 10a-11a. McCoy argues (Br. 31-32) that the major change was "not the addition of a new notice requirement ..., but the merging of the previously separate [notice] requirements into a single 45-day advance-notice rule." That argument ignores the actual rulemaking. The Board did amend § 226.9(c) to merge previously separate requirements regarding the timing of change-in-terms notice (and labeled that a "major" change). But it *also* made the major change of adding § 226.9(g) to the regulation in order to create a new requirement of notice in the very circumstances of this case, *i.e.*, default- and delinquency-based rate changes. Both the proposed and final rulemakings make this clear, stating that the "major" changes included revisions to both the timing of notices and the circumstances in which notice was required in the first place. *See Truth in Lending*, 74 Fed. Reg. 5,244, 5,244 (Jan. 29, 2009) (final rule) ("The final rule *expands the circumstances* under which consumers receive written notice of changes in the terms ..., *and* increase[s] the amount of time these notices must be sent before the change becomes effective." (emphases added)); *Truth in Lending*, 72 Fed. Reg. at 32,949 (proposed rule) (same). That is why the Board not only amended § 226.9(c) to increase the lead time for notice, but also added § 226.9(g) to address the new circumstances in which notice is required. If McCoy's reading of § 226.9(c) were correct, this second ("major") step would have been unnecessary. *See* Pet. Br. 36 (citing cases); U.S. Br. 21; U.S. Br. App. 12a-13a.

Third, McCoy inaccurately portrays (Br. 32-33) the meaning of the Board's statement in the 2007 proposed

rule that a change-in-terms notice was not required where the card agreement "permit[ted] the card issuer to increase the periodic rate if the consumer makes a late payment," *Truth in Lending*, 72 Fed. Reg. at 33,009, *cited in* Pet. Br. 32-34; *see also* U.S. Br. App. 7a-8a (quoting same language in the 2004 advance notice of proposed rulemaking). According to McCoy (Br. 33), that statement "does not indicate whether the ... rate would ... automatically apply in the event of a default or, as in Chase's cardholder agreement, allows the creditor discretion to set the new rate somewhere within a wide range." McCoy's assertion is incorrect. The Board's statement explicitly refers to a contract that "permit[s]" a creditor to raise rates in response to a default, not one that requires it. *Truth in Lending*, 72 Fed. Reg. at 33,009. The Board thus was referring not to an automatic, nondiscretionary rate increase, but rather to one just like McCoy's. The Board's stated position was therefore clear: Under the applicable version of Regulation Z, no change-in-terms notice was required here.

D. McCoy's "Purpose" Arguments Lack Merit

Finally, McCoy argues (Br. 19-23) that Chase's interpretation of the prior Regulation Z is inconsistent with TILA's broad purposes. That argument is without merit.

According to McCoy, Chase's reading undermines the "primary purpose[] of protecting consumers." Resp. Br. 19 (capitalization altered). As Chase explained, however (Br. 27-28), it is McCoy's view that could have hurt consumers. If McCoy's interpretation were correct, card issuers would have had an incentive to eliminate their discretion to impose less than the maximum penalty rate in response to a default, because

retaining such discretion would have incurred an increased disclosure burden. That is hardly an approach likely to benefit consumers. And McCoy offers no response.

Under Chase's and the Board's interpretation, moreover, cardholders were given notice, in advance, of applicable defaults and corresponding maximum penalty rates. McCoy argues (Br. 20) that this information was insufficient, that unless cardholders knew the exact rate that applied to each default—or at least the formula by which issuers would select the penalty rate—TILA's disclosure regime would be "render[ed] meaningless." As Judge Cudahy explained, that is at minimum highly debatable:

> McCoy had all the information he needed ... to enjoy the informed use of his credit. He knew the conditions in which Chase could increase his interest rate and those conditions were under his control. He also knew the highest possible [penalty] rate .... It seems extremely doubtful that in deciding whether to pay his bills on time, McCoy might have attempted to use [Chase's] formula to determine what his chances were of keeping the same interest rate.

Pet. App. 32a-33a (Cudahy, J., dissenting); *see also Ford Motor Credit*, 444 U.S. at 568-569, *quoted supra* p. 8 (explaining that meaningful disclosure does not mean more disclosure). McCoy may disagree about the most effective disclosure, but there can be no dispute that under Chase's and the Board's construction, Regulation Z afforded significant disclosure—at the outset of the credit relationship.

The Board, of course, has recently reweighed its policies, following a multi-year study of the subject, and

amended the regulation as a result. Contrary to McCoy's urging, however, the findings that led the Board to do so cannot be superimposed on the old version of the regulation, somehow requiring McCoy's construction. The Board properly concluded that its change of views was best implemented by amending the regulation through notice-and-comment rulemaking. In deference to Congress's determination that it is for the Board to implement TILA through its broad rulemaking power, McCoy's request—that the earlier regulation be judicially revised so as to have the same meaning as the version that the Board concluded required the amendment process—should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHRISTOPHER R. LIPSETT
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Ave.
New York, N.Y. 10022
(212) 230-8800

SETH P. WAXMAN
Counsel of Record
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

NOVEMBER 2010

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
JUN 1 - 2010
OFFICE OF THE CLERK

No. 09-329

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,
Petitioners,

v.

JAMES A. MCCOY,
on behalf of himself and all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES

BARRY L. KRAMER
12428 Promontory Road
Los Angeles, CA 90049
(310) 440-9761

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Respondent

June 1, 2010

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES

The government acknowledges that the question presented in this case is of "limited prospective significance in light of the 2009 amendments" to Regulation Z. U.S. Br. 18. Indeed, the government does not deny that the question has no significance whatsoever outside of a handful of still-pending cases brought under the old regulation. The government also does not deny that plenary review is unwarranted.

Nonetheless, the government contends that this Court should grant, vacate, and remand ("GVR") in light of the government's lower-court amicus brief interpreting the old regulation. The regulation and the commentary, however, were both promulgated in 1981; the Federal Reserve Board's amicus brief in the First Circuit was filed 28 years later, in 2009—after the regulations had already been amended to require the very disclosures at issue. And the amicus brief in question was not filed until October 22, 2009—one month after the petition for certiorari in this case was filed.

1. The Court should not GVR, but should instead deny the petition. A GVR in light of the government's lower-court amicus brief would be unprecedented. As far as respondents are able to determine, this Court has not previously GVR'ed in light of a lower-court amicus brief, let alone an amicus brief concerning the meaning of a superseded regulation. To be sure, this Court has GVR'ed in light of "administrative reinterpretations of federal statutes," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), but the government does not contend that any such reinterpretation or change in position occurred here. To the contrary, the government claims that the October 2009

amicus brief represents "the Board's longstanding interpretation" of the pre-2009 regulations. U.S. Br. 11.

In addition, a GVR in light of the amicus brief would open the door to "unfair or manipulative litigation strategy." *Lawrence*, 516 U.S. at 168; *see Department of the Interior v. South Dakota*, 519 U.S. 919, 921 (1996) (Scalia, J., dissenting). Such a GVR would invite government abuse in future cases and encourage litigants to file petitions for certiorari solely in the hope of obtaining a favorable brief from a government agency and subsequent remand from this Court. Those filings, in turn, would threaten to needlessly expand this Court's certiorari docket and place undue pressure on government agencies to produce briefs at the behest of regulated industries. It would also inevitably involve this Court in routine pleas for error correction in a wide range of cases. Moreover, to GVR in light of an agency amicus brief stating a view on the merits of a case would signal to the lower courts that the agency's view should prevail. Yet resolving questions presented in a petition for certiorari is the Court's role, not the government's. Where, as here, a question does not warrant this Court's review, the Court should not cede to an agency the power to answer the question through an amicus brief.

Members of this Court have increasingly expressed concern that the GVR device has become overused and governed by increasingly malleable standards. "The systematic degradation of our traditional requirements for a GVR," Justice Scalia recently remarked, "has spawned a series of unusual dispositions, including the GVR so the government can try a less extravagant argument on remand, the GVR in light of nothing, and the newly-minted Summary Remand for More Extensive Opinion than Petitioner Requested (SRMEOPR)." *Wellons v. Hall*, 130 S. Ct. 727, 732 (2010) (Scalia, J., joined by Thomas, J.,

dissenting) (internal citations omitted); *see id.* at 734 (Alito, J., joined by Roberts, C.J., dissenting). The Court should not expand the scope of GVR's to encompass cases in which the government has filed a brief in a lower court taking a position on the question presented—particularly where the question presented has as little ongoing significance as it does here.

2. Intervention by this Court is also particularly unwarranted because any practical impact of the question presented may be eliminated by litigation on remand from the court of appeals. The government does not address the possibility that resolution of the state-laws claim may render resolution of the federal-law claim academic. BIO 7-8. Nor does the government deny that "Chase may, at a later stage of litigation, assert a statutory 'good-faith' defense under 15 U.S.C. § 1640(f) for acting in conformity with an [official] FRB interpretation." Pet. App. 13a n.14. Under that "good faith" defense, a creditor is completely immune from civil liability for acts "done or omitted in good faith in conformity with any rule, regulation, or interpretation" of TILA by the Board, even if the rule or regulation at issue is subsequently amended or rescinded. 15 U.S.C. § 1640(f). In a footnote, the government says it is "not clear" whether petitioner could successfully mount such a defense because an amicus brief is not official staff commentary. U.S. Br. 20 n.5. But the government does not deny that Chase would be free to cite the amicus brief in making such a defense, and that district court would be free to take it into account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BARRY L. KRAMER
12428 Promontory Road
Los Angeles, CA 90049
(310) 440-9761

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 0 2 2010
OFFICE OF THE CLERK

No. 09-329

In the Supreme Court of the United States

CHASE BANK USA, N.A., PETITIONER

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
LEONDRA R. KRUGER
Acting Deputy Solicitor General
MICHAEL S. RAAB
MATTHEW M. COLLETTE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

SCOTT G. ALVAREZ
General Counsel
RICHARD M. ASHTON
Deputy General Counsel
KATHERINE H. WHEATLEY
Associate General Counsel
Board of Governors of the Federal Reserve System
Washington, D.C. 20551

470

QUESTION PRESENTED

The Federal Reserve Board's Regulation Z, 12 C.F.R. Pt. 226 (2008), amended by 74 Fed. Reg. 36,094-36,101 (2009), implements the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* Because the events that gave rise to this suit occurred before Regulation Z was amended in 2009, this case is governed by the pre-amendment version of the regulation. The question presented is as follows:

Whether, at the time of the events at issue in this case, Regulation Z required a credit card issuer to provide a change-in-terms notice before increasing the periodic interest rate on a credit card account pursuant to a default-rate term that had previously been disclosed in the cardholder agreement governing the account.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 11
Argument:
Before its amendment in 2009, Regulation Z did not require a credit card issuer to provide a change-in-terms notice before implementing a contractual default-rate term 12
A. Regulation Z and accompanying Official Staff Commentary did not require credit card issuers to provide a change-in-terms notice before raising a periodic rate under circumstances disclosed in the card agreement 12
B. The Federal Reserve Board's longstanding interpretation of its regulations is entitled to deference 18
Conclusion 25
Appendix – Brief for the Board of Governors of the Federal Reserve System, *Shaner* v. *Chase Bank, N.A.*, 587 F.3d 488 (1st Cir. 2009) (No. 09-1157) 1a

TABLE OF AUTHORITIES

Cases:

Anderson Bros. Ford v. *Valencia*, 452 U.S. 205 (1981) 13, 19
Auer v. *Robbins*, 519 U.S. 452 (1997) 7, 11, 23, 24
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 20

Cases—Continued: Page

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 13, 23, 24
Long Island Care at Home, Ltd. v. *Coke*, 546 U.S. 1147 (2006) 23
Shaner v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009) ..... *passim*
Swanson v. *Bank of Am., N.A.*, 559 F.3d 653 (7th Cir. 2009) 21

Statutes and regulations:

Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 6
§ 101(a)(1), 123 Stat. 1735 6
§ 101(a)(2), 123 Stat. 1736 6
Truth in Lending Act, 15 U.S.C. 1601 *et seq.* 1, 2
15 U.S.C. 1601(a) 2
15 U.S.C. 1602(b) 1, 2
15 U.S.C. 1604(a) 1, 2
15 U.S.C. 1640(f) 2, 13
12 C.F.R. Pt. 226 (2008) ..... *passim*
Section 226.6(a)(2) 2, 12
Section 226.7(d) 2
Section 226.9 ..... 3, 12, 14, 18, 19
Section 226.9(c) 5, 6, 12, 14, 21
Section 226.9(c)(1) 3, 4, 14
Section 226.9(c)(2) 16
Section 226.9(c)(2)(i) (2010) 21
Section 226.9(g) (2010) 6, 21

Regulations—Continued: Page

Supp. I, Official Staff
Interpretations 3, 4, 5, 11, 12, 13
Cmt. 9(c)-1 ..... *passim*
Cmt. 9(c)(1)-3 ..... 4, 8, 9, 14, 15

Miscellaneous:

74 Fed. Reg. (2009):
p. 36,077 6
pp. 36,095-36,096 6
Truth in Lending, 69 Fed. Reg. 70,925 (2004):
pp. 70,931-70,932 ..... 5, 18
p. 70,932 ..... 5, 18
Truth in Lending, 72 Fed. Reg. 32,948 (2007) 5
p. 33,009 ..... 5, 20, 21
p. 33,012 ..... 6, 19
p. 33,058 5
pp. 33,086-33,145 13
Truth in Lending, 74 Fed. Reg. 5244 (2009) 6, 19
p. 5254 ..... 6, 19
p. 5413 6
p. 5414 6
pp. 5450-5498 13

In the Supreme Court of the United States

No. 09-329

CHASE BANK USA, N.A., PETITIONER

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, imposes disclosure requirements on creditors that offer consumer credit plans, such as credit cards. The Board of Governors of the Federal Reserve System is authorized to issue regulations to carry out the Act. 15 U.S.C. 1604(a); see 15 U.S.C. 1602(b). The question in this case is whether, before its amendment in 2009, the Board's Regulation Z, 12 C.F.R. Pt. 226 (2008), required a credit card issuer to provide a change-in-terms notice before increasing the periodic interest rate on a credit card account pursuant to a default-rate term that had previously been disclosed in the cardholder agreement governing the account. The Board has taken the position

that Regulation Z in its pre-amendment form did not impose such a requirement. The United States therefore has a substantial interest in the proper interpretation of Regulation Z. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. 1601(a). The statute confers broad authority on the Board of Governors of the Federal Reserve System (Board) to issue regulations to carry out the Act. See 15 U.S.C. 1604(a); see also 15 U.S.C. 1602(b). Creditors that act in good-faith reliance on a rule, regulation, or interpretation by the Board or its staff are protected from civil liability under TILA. 15 U.S.C. 1640(f).

The Board's Regulation Z, 12 C.F.R. Pt. 226, adopted pursuant to Section 1604(a), requires credit card issuers to disclose certain information to consumers. At the time of the transactions at issue in this case, Regulation Z required credit card issuers to provide an "initial disclosure statement" specifying, *inter alia*, "each periodic rate that may be used to compute the finance charge." 12 C.F.R. 226.6(a)(2).[1] The regulation also required credit card issuers to provide a "periodic statement" notifying the consumer of the rates imposed during the previous billing cycle. 12 C.F.R. 226.7(d). Finally, the

---

[1] As detailed p. 6, *infra*, in 2009, the Board amended Regulation Z's provisions relating to disclosure of changes in credit card finance charges, and Congress amended TILA to address the same subject. Unless otherwise noted, references to Regulation Z in this brief are to the pre-amendment version of the regulation.

regulation imposed certain "[s]ubsequent disclosure requirements," 12 C.F.R. 226.9, including a requirement to provide notice "[w]henever any term required to be disclosed under § 226.6 is changed," 12 C.F.R. 226.9(c)(1).

Some credit card agreements state the interest rate that will be used to calculate the account holder's finance charge, while further providing that the rate may be increased up to a particular amount upon the occurrence of specified contingencies, such as the account holder's failure to make timely payments. The question presented in this case is whether, under the pre-2009 version of Regulation Z, credit card issuers were required to give advance notice before effecting rate changes pursuant to such pre-existing contract terms.

The Board's Official Staff Commentary to the pre-2009 change-in-terms provision explained that the notice requirement did not apply "if the specific change is set forth initially, such as * * * an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary). On the other hand, the commentary explained, "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate)." *Ibid.*

Regulation Z generally mandated that any required change-in-terms notice be provided 15 days in advance of the effective date of the change. 12 C.F.R. 226.9(c)(1).

But when an interest rate increase resulted from the consumer's delinquency or default, the regulation permitted creditors to increase the rate with less than 15 days' notice, as long as notice was provided "before the effective date of the change." *Ibid.* The Official Staff Commentary explained:

> *Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change * * * [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

Official Staff Commentary, cmt. 9(c)(1)-3.

2. In 2004, the Board began an initial inquiry into whether to amend the disclosure requirements governing the implementation of contractual default rate provisions. The Board explained:

> Under Regulation Z, some changes to the terms of an open-end plan require additional notice. * * * However, advance notice is not required in all cases. For example, if the interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. 226.9(c)(1); comment 9(c)(1)-3. And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if [the] card issuer learns the consumer paid late on another credit account, even if the con-

> sumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 69 Fed. Reg. 70,931-70,932 (2004) (advance notice of proposed rulemaking). Noting that "[c]onsumer advocates have expressed concerns that consumers who have triggered certain penalty rates may not be aware of the possibility of the increase, and thus are unable to shop for alternative financing before the increased rate takes effect," the Board asked for comment on whether these "existing disclosure rules" were "adequate to enable consumers to make timely decisions about how to manage their accounts." *Id.* at 70,932.

In 2007, the Board published proposed amendments to Regulation Z and to the Official Staff Commentary. *Truth in Lending*, 72 Fed. Reg. 32,948 (proposed rule). Describing Section 226.9(c) in its then-current form, *id.* at 33,009, the Board proposed an amendment that would require 45 days' advance written notice when "(i) A rate is increased due to the consumer's delinquency or default; or (ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 33,058. The Board explained that "[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the

occurrence of certain events specified in the contract." *Id.* at 33,012.

In 2009, the Board promulgated a final rule implementing the proposed changes. *Truth in Lending*, 74 Fed. Reg. 5254. The Board amended Section 226.9(c) to require 45 days' prior notice of contractual changes, including changes in the terms governing computation of finance charges. *Id.* at 5413. The Board also adopted new Section 226.9(g), which requires 45 days' advance notice of increases in rates due to delinquency, default, or as a penalty, including penalties for "events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 5414.[2]

3. In March 2004, respondent filed suit on behalf of himself and others similarly situated. Respondent alleged, *inter alia*, that petitioner had violated TILA by raising the interest rates of members of the putative class, without providing advance notice of the increases, after class members made late payments to petitioner or another creditor. Pet. App. 2a, 35a, 38a.

The district court granted petitioner's motion to dismiss. Pet. App. 37a-47a. The court noted that petitioner's Cardmember Agreement "specifically authorizes

---

[2] The 2009 amendments were scheduled to become effective on July 1, 2010. 74 Fed. Reg. at 5244. In May 2009, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), Pub. L. No. 111-24, 123 Stat. 1734. *Inter alia*, the Credit CARD Act amended TILA to require 45 days' advance notice of increases in annual percentage rates on credit card plans. § 101(a)(1), 123 Stat. 1735. That provision became effective on August 20, 2009. § 101(a)(2), 123 Stat. 1736. In response, the Board determined that the 2009 amendments to Regulation Z at issue in this case would likewise become effective on August 20, 2009. See 74 Fed. Reg. at 36,077, 36,095-36,096 (interim final rule).

[petitioner] to raise a cardholder's interest rate if the cardholder is delinquent with [petitioner] or another creditor." *Id.* at 39a. Citing the Official Staff Commentary to Regulation Z, Comment 9(c)-1, the court concluded that petitioner had not violated TILA or Regulation Z by failing to provide advance notice of the rate increase. The court explained:

> [B]ecause [petitioner] discloses the basis on which it will increase interest rates due to default, and discloses the highest rate that could apply, an increase in the interest rate based on these specific circumstances is not a change in terms within the meaning of Regulation Z, and no additional notice to the cardmember is required.

Pet. App. 43a-44a (footnote omitted).

4. The court of appeals reversed and remanded. Pet. App. 1a-33a.[3] The court "acknowledge[d] that the text of Regulation Z is ambiguous" with respect to the question presented here, and it recognized that a reviewing court must "defer to an agency interpretation of its own ambiguous regulation provided it is not 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 4a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court of appeals rejected petitioner's contention that the Board's "Official Staff Commentary interprets Regulation Z to require no notice in this case." *Ibid.* The court concluded that the "most salient Official Staff

---

[3] The court of appeals issued its decision on March 16, 2009, see Pet. App. 1a—*i.e.*, after the 2009 amendments to Regulation Z had been published in the *Federal Register* but before those amendments took effect. Because the transactions at issue here occurred before the amendments' effective date, it is undisputed that this case is governed by the pre-2009 version of the rule.

Commentary" was Comment 9(c)(1)-3, which the court read "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." *Ibid.*

The court of appeals further concluded that Comment 9(c)-1, which provides that "[n]o notice of a change in terms need be given if the specific change is set forth initially," did not "dispel [petitioner's] obligation" under Comment 9(c)(1)-3 "to notify its account holders of discretionary rate increases." Pet. App. 5a (emphasis and citation omitted). The court assumed arguendo that Comment 9(c)-1 applied to interest-rate changes. *Id.* at 6a. The court concluded, however, that petitioner's Cardmember Agreement had not set forth a "specific" change within the meaning of the provision, since the Agreement did not state precisely what rate would apply in the event of a default, but instead permitted petitioner to increase the rate up to a stated maximum. *Id.* at 6a-9a.

Petitioner also contended that the 2007 notice of the Board's proposed rule, which described the Board's understanding of the regulatory regime in effect before the 2009 amendments, supported petitioner's interpretation of Regulation Z in its pre-amendment form. Pet. App. 9a. The court of appeals rejected that argument. The court found the 2007 proposed rule and accompanying explanation to be "ambiguous" as to whether notice was required under the circumstances of this case. *Id.* at 10a-11a. The court also stated that the 2007 notice of the Board's proposed rule would be of limited relevance in any event because the court would "defer to the [Board's] Official Staff Commentary, not incidental descriptions of current law contained in an [advance notice

of proposed rulemaking]." *Id.* at 13a n.14. The court of appeals concluded that the various explanatory materials issued by the agency left the court "firmly convinced of the [Board's] intent to require contemporaneous notice when rates are raised because of a consumer's delinquency or default, as [respondent] alleges occurred in this case." *Id.* at 13a-14a.

Judge Cudahy dissented. Pet. App. 19a-33a. In his view, the court of appeals should have deferred to the Board's explanation, expressed in both the 2004 advance notice of proposed rulemaking and the 2007 notice of the Board's proposed rule, that "requiring additional notice" before implementing contractual default-rate terms "is a change from" the requirements imposed by Regulation Z in its pre-amendment form. *Id.* at 22a. Judge Cudahy also found the court's reliance on Comment 9(c)(1)-3 to be misplaced. *Id.* at 28a-29a. He expressed the understanding that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but instead "specifically governs timing issues." *Ibid.* Judge Cudahy would instead have held that, under Comment 9(c)-1, no notice was required under the circumstances presented here because the Cardmember Agreement had set forth the "*specific change*" at issue. *Ibid.* (quoting Official Staff Commentary, cmt. 9(c)-1); see *id.* at 29a-32a.

5. After the court of appeals issued its decision in this case, the First Circuit confronted the same question as is presented here in *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (2009). In order to ascertain the Board's understanding of Regulation Z in its pre-2009 form, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board sub-

mitted an amicus brief addressing the question. See *id.* at 491. That amicus brief explained:

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Board Br. at 1, *Shaner*, *supra* (No. 09-1157).[4]

Consistent with the interpretation advanced in the Board's amicus brief, the First Circuit in *Shaner* held that the credit card issuer in that case was not required to provide advance notice before raising card holders' interest rates pursuant to a provision of the member agreement that authorized such increases upon the occurrence of a late payment. 587 F.3d at 492-493. The First Circuit explained that the Board's brief "was solicited [by the court] to supply the Board's view of its own regulations and as such it is entitled to due respect as the agency's 'fair and considered judgment on the mat-

---

[4] The Board's brief in *Shaner* is reprinted in the appendix to this brief. App., *infra*, 1a-19a.

ter in question.'" *Id.* at 493 (quoting *Auer*, 519 U.S. at 462).

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that, at the time of the transactions at issue in this case, Regulation Z required credit card issuers to provide a change-in-terms notice before implementing a contractual default-rate provision.

Before it was amended in 2009, Regulation Z required credit card issuers to provide notice before changing any contractual term that must be disclosed in an initial disclosure statement. In some circumstances, that notice requirement applied to changes in the cardholder's periodic interest rate. In its Official Staff Commentary to Regulation Z, however, the Board made clear that a change-of-terms notice was not required "if the specific change is set forth initially." Official Staff Commentary, cmt. 9(c)-1. The Board gave as an example "a rate increase that occurs * * * when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Ibid.* The same rule applied, by analogy, when a cardholder agreement authorized the issuer to increase a consumer's interest rate if the consumer failed to make timely payments to his creditors. If a cardholder who had agreed to that contractual term made a late payment, any resulting rate increase did not represent a "change in terms," but rather the implementation of terms already set forth in the initial disclosure statement.

When the Federal Reserve Board amended Regulation Z in 2009 to require credit card issuers to provide

notice before implementing contractual default-rate provisions, it did so on the understanding that the pre-amendment version of Regulation Z imposed no similar requirement. Since that time, the Board has repeatedly confirmed its view that Regulation Z in its pre-2009 form did not require credit card issuers to provide a change-in-terms notice under the circumstances presented in this case. The Board's longstanding interpretation of its regulation is reasonable and entitled to deference.

ARGUMENT

BEFORE ITS AMENDMENT IN 2009, REGULATION Z DID NOT REQUIRE A CREDIT CARD ISSUER TO PROVIDE A CHANGE-IN-TERMS NOTICE BEFORE IMPLEMENTING A CONTRACTUAL DEFAULT-RATE TERM

A. Regulation Z And Accompanying Official Staff Commentary Did Not Require Credit Card Issuers To Provide A Change-In-Terms Notice Before Raising A Periodic Rate Under Circumstances Disclosed In The Card Agreement

1. At the time of the transactions at issue in this case, Regulation Z required a creditor to provide notice before changing any contractual term, such as the cardholder's periodic interest rate, that must be disclosed in an initial disclosure statement. 12 C.F.R. 226.9(c); see 12 C.F.R. 226.6(a)(2). Regulation Z did not, however, require a creditor to provide notice before implementing a term that had been previously disclosed. In its Official Staff Commentary addressing Section 226.9, the Board explained that "[n]o notice of a change in terms need be given if the specific change is set forth initially." Official

Staff Commentary, cmt. 9(c)-1.[5] The commentary provided as an example "a rate increase that occurs * * * when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Ibid.*

In the present case, the contingency that triggered increases in respondents' interest rates was the failure to make timely payments rather than the failure to maintain a minimum balance. The Board's reasoning in Comment 9(c)-1, however, applies with full force to the situation presented here, where the cardholder agreements between petitioner and respondents authorized petitioner to increase respondents' interest rates if respondents were delinquent in their payments to creditors. If a cardholder who had agreed to that contractual term made a late payment, any resulting rate increase did not represent a "change in terms," but rather the implementation of terms already set forth in the initial

---

[5] As the court below correctly recognized, the Official Staff Commentary constitutes an authoritative interpretation of Regulation Z. Pet. App. 13a & n.14; see *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA] or Regulation [Z] should be dispositive."); see also *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation."). Changes in the Commentary, like changes to Regulation Z itself, are made through notice-and-comment rulemaking. See, *e.g.*, 72 Fed. Reg. at 33,086-33,145 (proposing amendments to the Commentary); 74 Fed. Reg. at 5450-5498 (2009) (adopting final amendments). Good-faith compliance with the Official Staff Commentary and other staff interpretations provides protection from liability under 15 U.S.C. 1640(f).

disclosure statement. No notice was therefore required under Section 226.9 in its pre-2009 form.

2. In reaching a contrary conclusion, the court of appeals relied on Comment 9(c)(1)-3 of the Official Staff Commentary. Comment 9(c)(1)-3 stated that in the event of "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default," a "notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change" rather than the usual 15 days in advance. Official Staff Commentary, cmt. 9(c)(1)-3; see 12 C.F.R. 226.9(c). The court of appeals construed Comment 9(c)(1)-3 "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." Pet. App. 4a. The court viewed Comment 9(c)(1)-3 as applicable even when, as in this case, a cardholder's interest rate was increased pursuant to a pre-existing term of the cardholder agreement that authorized such a change upon the occurrence of specified contingencies. See *id.* at 5a.

The court of appeals' analysis reflects a misunderstanding of Comment 9(c)(1)-3. Properly construed, Comment 9(c)(1)-3 addressed situations in which a card issuer increased a consumer's finance charge based on the cardholder's delinquency or default, even though no provision of the pre-existing cardholder agreement authorized such an increase. Comment 9(c)(1)-3 also applied if the cardholder agreement authorized the issuer to raise a delinquent or defaulting consumer's interest rate up to a specified maximum, and the issuer responded to a cardholder's delinquency or default by raising the rate to a level *above* that maximum. In those circumstances, Section 226.9(c)(1) required notice of the

rate increase because that increase effected a change in the cardholder agreement rather than the implementation of its existing terms.

Rather than establishing a freestanding disclosure requirement, Comment 9(c)(1)-3 specified the time at which such disclosures must be made—*i.e.*, "as late as the effective date of the change" rather than the usual 15 days in advance. Comment 9(c)(1)-3's status as a timing requirement was made clear by its heading ("*Timing—advance notice not required*") and location (under the general heading "9(c)(1) Written Notice Required"). Comment 9(c)(1)-3 did not create substantive disclosure requirements where Regulation Z itself and Comment 9(c)-1 did not demand them. See Pet. App. 28a-29a (Cudahy, J., dissenting) (explaining that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but rather "assumes situations where notice is required and controls only timing"); *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488, 492 (1st Cir. 2009) (explaining that "comment 3 merely describes *when* notice must be given where it is otherwise required, whereas comment 1 explains *whether* changes specified in advance constitute changes in terms necessitating notice").

3. The court of appeals also concluded that Comment 9(c)-1 was inapplicable to this case because petitioner's Cardmember Agreement was insufficiently "specific"—that is, because it gave petitioner discretion to determine whether, and to what extent, it would increase a defaulting consumer's interest rate up to a specified maximum. See Pet. App. 7a-8a. That analysis is mistaken.

When a cardholder agreement identifies a contingency that triggers a rate increase, and the maximum

possible rate that the issuer may charge if that contingency occurs, the agreement does not lack the requisite specificity merely because it allows the issuer to exercise discretion in the consumer's favor. Under 12 C.F.R. 226.9(c)(2), no change-in-terms notice is required "when the change involves * * * a reduction of any component of the finance or other charge." If a particular cardholder agreement specified the exact rate that would apply automatically in the event of a default, the credit card issuer would retain discretion to reduce the increased rate, to a point between the penalty rate and the original rate, immediately after the penalty rate took effect. Even under the court of appeals' reading of Comment 9(c)-1, neither the automatic increase nor the subsequent decrease would require advance notice.

When (as here) a cardholder agreement authorizes the issuer to increase a cardholder's interest rate up to a specified maximum in the event of cardholder delinquency or default, the practical effect is to allow the issuer to combine into one discretionary rate increase the two steps described above. Petitioner's authority to proceed in that more direct manner, however, did not give respondents any greater need for advance notice of the specific increased rate that would be imposed than would the cardholders in the foregoing hypothetical. See Pet. App. 30a-31a n.6 (Cudahy, J., dissenting). And the Board's core rationale for declining to require notice in these circumstances applies equally whether the cardholder agreement *requires* or simply *allows* a specified increase in the cardholder's interest rate upon the occurrence of particular contingencies. Under either kind of agreement, Regulation Z in its pre-amendment form did not require notice of a rate increase because the in-

crease reflected an implementation of the parties' existing contract rather than a change in its terms.[6]

---

[6] In support of its reading of the word "specific" in Comment 9(c) 1, the court of appeals relied on the comment's three examples of circumstances in which notice is not required. See Pet. App. 6a-7a; Official Staff Commentary, cmt. 9(c)-1 (providing as examples "rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum"). Because the court of appeals read each example as involving implementation of a non-discretionary rate increase, it viewed the examples as "reinforc[ing]" the court's conclusion that a change-of-terms notice is required before a credit card issuer can implement a default-rate provision that allows the issuer the discretion to impose a rate lower than a specified maximum. Pet. App. 6a 7a. That reading is incorrect. As the dissenting judge explained, "ascertainability is not an essential element of the second and third examples," neither of which "states one way or the other whether they involve a precise and automatic increase." *Id.* at 32a (Cudahy, J., dissenting).

The court of appeals also viewed the penalty-rate provision of the Cardmember Agreement at issue here as comparable to a reservation of rights clause that permits the lender to change the periodic rate at any time. See Pet. App. 8a-9a. The court reasoned (*ibid.*) that, because notice must be given before a card issuer may increase the rate pursuant to such a clause, see Official Staff Commentary, cmt. 9(c)-1, petitioner was likewise required to give notice before raising respondents' interest rates to a level at or below the maximum specified in the applicable penalty-rate provision. The court of appeals erred in equating those contract terms. A provision that specifies that a creditor may impose a specific maximum rate upon the occurrence of a particular event is not comparable to a general reservation of the right to impose any periodic rate at any time.

B. The Federal Reserve Board's Longstanding Interpretation Of Its Regulations Is Entitled To Deference

1. In 2009, the Federal Reserve Board amended Section 226.9 to require credit card issuers to give 45 days' advance notice before implementing a contractual default-rate term. Before that amendment was adopted, however, the Board expressed its understanding that Regulation Z in its pre-amendment form imposed no similar requirement. In adopting that amendment, the Board confirmed that the notice requirement represented a change from prior law. And the Board's subsequent amicus brief in *Shaner*, *supra*, which was submitted after the court of appeals' decision in this case and in response to the First Circuit's request for the Board's views on the precise question presented here, eliminated any ambiguity that might previously have existed. The Board's understanding of its pre-2009 regulations is entitled to deference.

a. In its 2004 advance notice of proposed rulemaking, the Board stated that "no change-in-terms notice is required" for a rate increase pursuant to an agreement that "permit[s] the card issuer to increase the interest rate if the consumer pays late." 69 Fed. Reg. at 70,931-70,932. The Board explained that, "[u]nder Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Id.* at 70,932.

The Board expressed a similar understanding of the existing rule in 2007, when it proposed changing the rule. The Board explained that its "proposed rule would impose a de facto limitation on the implementation of

contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract." 72 Fed. Reg. at 33,012.

And when the Board ultimately amended Section 226.9 in 2009, the Board described the amendment as a "Major Change[]" to the existing rule. 74 Fed. Reg. at 5244. The Board further explained:

> Even though the final rule contain[s] provisions intended to improve disclosure of penalty pricing at account opening, the Board believes that consumers will be more likely to notice and be motivated to act if they receive a specific notice alerting them of an imminent rate increase, rather than a general disclosure stating the circumstances when a rate might increase.

Id. at 5254.

b. The court of appeals dismissed the Board's statements in those documents as purely "incidental descriptions of current law." Pet. App. 13a n.14. In fact, the 2004 and 2007 descriptions of then-current law were authoritative summaries of the Board's interpretation of the existing change-in-terms requirements, published in the *Federal Register*, and provided to explain the Board's proposal to change the very rule it was describing. As such, they were entitled to the court's deference. See, *e.g.*, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 212-213, 219 (1981) (according weight to a proposed official staff interpretation of Regulation Z published in the *Federal Register*).[7]

---

[7] Under established administrative law principles, when an agency chooses to rescind or modify an existing policy, "the requirement that

c. The court of appeals (Pet. App. 10a-11a) also misread the 2004 and 2007 notices, finding ambiguity in their descriptions of then-existing law where no ambiguity existed. In particular, the court misread the 2007 notice's statement that "the creditor currently need not provide a change-in-terms notice" before implementing a contractual default-rate provision. *Id.* at 10a (quoting 72 Fed. Reg. at 33,009). Hypothesizing that "the term 'change-in-terms notice'" might "refer only to the fifteen days' advance notice required for changes in contractual terms," the court suggested that language was consistent with a rule requiring issuers to give *contemporaneous* notice of a rate increase. *Ibid.* The court's approach reflects an unnaturally circumscribed understanding of the phrase "change-in-terms notice," even if that phrase is considered in isolation. And as the court itself recognized, the relevant sentence of the 2007 notice went on to state that, under Regulation Z in its pre-amendment form, "the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Ibid.*

---

an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio*." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Thus, far from being "incidental to the purpose of" the relevant Federal Register notices (Pet. App. 13a & n.14), the Board's description of existing law was integral to its explanation of the new disclosure requirements it proposed to adopt. The Board's 2004 advance notice of proposed rulemaking, moreover, specifically requested public comment on whether the agency's "existing disclosure rules" were "adequate to enable consumers to make timely decisions about how to manage their accounts." 69 Fed. Reg. at 70,932. The public's ability to comment on (and the Board's ability to determine) the adequacy of the "existing disclosure rules" obviously depended on an accurate understanding of what those rules did and did not require.

(quoting 72 Fed. Reg. at 33,009). That statement makes clear that the Board did not construe its pre-amendment regulation to require even contemporaneous notice when an interest rate is increased pursuant to a contractual default-rate provision.

Moreover, if the court of appeals' interpretation of Section 226.9(c) were correct, it would not have been necessary for the Board to create a new Section 226.9(g) to govern notices of rate increases "due to delinquency, default or as a penalty * * * that are not due to a change in the contractual terms of the consumer's account," 12 C.F.R. 226.9(c)(2)(i) (revised text effective July 1, 2010), since notice would already have been required under the basic change-in-terms provision, Section 226.9(c). The Board's addition of subsection (g) provides further evidence that the Board did not interpret Section 226.9(c) to require notice when rates are raised in accordance with contractual default terms. Given the Board's explanations of the purpose of the amendment, and the nature of the amendment itself, the court of appeals erred in refusing to "tak[e] the Board at its word" that the 2009 amendment "ma[de] a real change." *Swanson* v. *Bank of Am., N.A.*, 559 F.3d 653, 657 (7th Cir. 2009).

2. In any event, whatever ambiguity might have remained after the series of *Federal Register* notices explaining the reasons for the amendments to Section 226.9, it has since been dispelled. After the court of appeals issued its decision in this case, the First Circuit in *Shaner*, *supra*, confronted the same question as is presented here. The First Circuit noted the conflict on that question between the Ninth Circuit's decision in this case and the Seventh Circuit's decision in *Swanson*. See 587 F.3d at 490-491. In order to ascertain the Board's

understanding of Regulation Z in its pre-2009 form, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board submitted an amicus brief addressing the question. See *id.* at 491. The Board's amicus brief explained:

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Board Br. at 1, *Shaner*, *supra* (No. 09-1157).

The Board's amicus brief in *Shaner* removed any doubt as to the proper application of the Board's pre-amendment regulations under the circumstances presented here. In particular, the brief made clear that "[n]o pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs." *Ibid.* That proposition was implicit in prior agency pronouncements, see pp. 15-17, *supra*, but

it had not previously been made explicit. The Board's discussion of that point reflects the agency's clear disagreement with the court of appeals' conclusion in this case (see Pet. App. 7a-8a) that Comment 9(c)(1)'s reference to "specific" changes set forth in the initial cardholder agreement did not encompass provisions that allow card issuers to exercise discretion in deciding whether and to what extent to increase the periodic rate, up to a specified maximum rate, in the event of a default. For the reasons explained in this brief and in the brief that the United States previously filed at the petition stage in response to this Court's invitation, the Board continues to adhere to the position set forth in its brief in *Shaner*.

3. An agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted); accord, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007). This Court has recognized that its "traditional acquiescence in administrative expertise is particularly apt under TILA." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). As the Court explained in *Ford Motor Credit*, Congress delegated broad interpretive power to the Board in view of the "complexity and variety" of credit transactions, *id.* at 559, and the legislative history of the Act "evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation," *id.* at 568. For those reasons, this Court has concluded that "judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational." *Ibid.*

The Board's view of its pre-2009 regulations is reasonable and is entitled to deference. Although the Board has prospectively decided to require advance disclosure before issuers may implement contractual default-rate provisions, its prior approach "simply cannot be said to be unreasonable." *Auer*, 519 U.S. at 458. How much disclosure to require in this context "is a judgment call," *Shaner*, 587 F.3d at 492, and TILA "entrusts matters of judgment such as this to the [Board], not the federal courts," *Auer*, 519 U.S. at 458; see *Ford Motor Credit*, 444 U.S. at 568-569. And, notwithstanding the Board's recent determination that advance notice should be required in these circumstances, issuers in petitioner's position have a substantial and legitimate interest in avoiding unwarranted liability for conduct that was lawful at the time it occurred.

The Board's interpretation of its pre-2009 regulations, as set forth in amicus briefs filed in the First Circuit and in this Court, reflects the Board's "fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462 (deferring to agency interpretation advanced in an amicus brief); *Shaner*, 587 F.3d at 493 (deferring to the Board's amicus brief). That judgment is controlling in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

LEONDRA R. KRUGER
Acting Deputy Solicitor General

MICHAEL S. RAAB
MATTHEW M. COLLETTE
Attorneys

SCOTT G. ALVAREZ
General Counsel

RICHARD M. ASHTON
Deputy General Counsel

KATHERINE H. WHEATLEY
Associate General Counsel
Board of Governors of the Federal Reserve System

SEPTEMBER 2010

APPENDIX

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1157

JESSICA SHANER, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT

v.

CHASE BANK USA, N.A. DEFENDANT-APPELLEE

Oct. 22, 2009

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM AS *AMICUS CURIAE* AT THE REQUEST OF THE COURT

The Court has asked the Board of Governors of the Federal Reserve System (the Board) whether Regulation Z, 12 C.F.R. § 226.9, as in effect prior to its amendment in 2009, "required that notice of a credit card interest rate increase due to a late payment be provided to the holder of the card on or before the first day of the billing cycle to which the increase is applied, where the

card member agreement provides that the issuer 'may increase' the customer's annual percentage rate upon occurrence of a late payment up to a maximum of a default rate specified in the agreement's rates and fees table." Order of August 4, 2009.

For the reasons set forth below, the Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

A. Overview of Regulation Z

A brief discussion of the disclosure requirements of Regulation Z may assist the Court's consideration of this issue. In connection with open end credit such as credit card accounts, Regulation Z (as in effect at the time relevant to this action) requires three types of account disclosures: an initial disclosure, periodic statements, and, under some circumstances, subsequent disclosures—the type at issue in this case.

The "initial disclosure statement" is the disclosure document provided at account opening that includes disclosure of certain terms: the finance charge; other charges that may be imposed under the plan; and security interests that the creditor may acquire as part of the plan. 12 C.F.R. § 226.6(a)-(c). With regard to the finance charge, the initial disclosure statement must disclose "each periodic rate that may be used to compute the finance charge." *Id.* at 226.6(a)(2). "Periodic statements" are provided during the term of the plan, typically monthly, and reflect transactions during the billing period. 12 C.F.R. § 226.7. The periodic statement must include the periodic rates that may be used to compute the finance charge, the balances to which the periodic rate was applied, and the amount of the finance charge, among other things. *Id.* Thus, while the periodic statement alerts the consumer to the rates imposed during the just-ended billing cycle, it does not by itself provide notice of a rate increase before the application of that increase.

Finally, the regulation imposes "subsequent disclosure requirements," including the requirement to provide advance written notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1).[1] In most cases to which section

---

[1] Prior to its amendment in May 2009, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), did not address the issue of subsequent disclosure of changed terms in open-end credit; the requirement for subsequent disclosure was found only in the Board's Regulation Z. As discussed in text below, in January 2009 the Board amended Regulation Z to add a new section 226.9(g), providing for 45 days' advance notice of rate increases due to delinquency, default, or as a penalty. These provisions were set to become effective on July 1, 2010. On May 22, 2009, Congress enacted the Credit Card Accountability Responsibility

226.9(c)(1) applies, this notice of a change in the contract terms must be provided 15 days in advance of the effective date of the change. Section 226.9(c)(1) also specifies certain circumstances in which the written notice can be provided less than 15 days in advance, as long as it is provided "before the effective date of the change." One of these specified circumstances is an increase in the periodic rate of interest that is imposed by the creditor due to the consumer's delinquency. As explained below, however, changes in rates, including a rate increase due to delinquency, do not require a pre-effective date change-in-terms notice under section 226.9(c)(1) if the specific change is set forth in the initial contract.

As the regulation states, the subsequent disclosures prescribed in section 226.9(c)(1) are required only in the event that a term required to be disclosed under section 226.6 is "changed." The Board's Official Staff Commentary to Regulation Z, 12 C.F.R. Part 226, Supp. 1, ex-

---

and Disclosure Act of 2009 ("Credit CARD Act"), Pub. L. 111-24, which among other things amended TILA to add a new section 127(i) requiring 45 days' advance notice of increases in annual percentage rates on credit card plans. Credit CARD Act § 101(a)(1), 123 Stat. 1735. The provision became effective on August 20, 2009. *Id.*, § 101(a)(2). Accordingly, the Board adopted an amendment to Regulation Z which essentially moved up the effective date of its January 2009 rule change to August 20, 2009. *See* 74 Fed. Reg. 36077, 36095-96 (July 22, 2009). Unless otherwise indicated, references to TILA and Regulation Z in this brief refer to those provisions in effect before these amendments.

plains this provision.[2] In the first comment under section 9(c), Changes in Terms, the Commentary states:

> 1. *"Changes" initially disclosed.* No notice of a change in terms need be given if the specific change is set forth initially, such as: rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum.

Official Staff Commentary (OSC), comment 9(c)-1. The Board has never stated that the examples listed in this paragraph of the Commentary are exhaustive.

---

[2] The Official Staff Commentary (OSC) is the means by which the Board's Consumer and Community Affairs staff issues official staff interpretations of Regulation Z. Good faith compliance with the OSC and other staff interpretations provides protection from liability under section 130(f) of TILA, 15 U.S.C. § 1640(f). *See* Regulation Z, Supp. 1, Comment I-1; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9 (1980). Changes in the OSC are made in the same way that changes to Regulation Z itself are made: through notice-and-comment rulemaking, including publication for comment in the Federal Register. *See, e.g.*, 72 Fed. Reg. 33086-33145 (June 14, 2007) (proposing amendments to OSC); 74 Fed. Reg. 5450-549 (January 29, 2009) (adopting final amendments). The Supreme Court has recognized the authoritative nature of these official staff interpretations. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 (1981) (accepting proposed OSC amendment as reflecting the Board's interpretation of its regulation).

B. The Board's Interpretation of the Change in Terms Provision

The Board has consistently interpreted the language in section 226.9(c)(1) and the Commentary to mean that no pre-effective date notice is required when a creditor increases a rate as a result of a triggering event such as default, so long as the triggering event and the potential consequences have been previously disclosed in the initial agreement. In the Board's view, a rate increase under these circumstances was not considered a "change in terms," but rather was considered the implementation of terms already disclosed in the initial disclosures.

There are two ways that penalty rates can be imposed in the event of a consumer's default on a credit card account, and they have very different consequences in terms of subsequent disclosure under Regulation Z. *First*, a creditor can change the actual terms of the underlying card member agreement to impose a penalty rate even when the agreement did not specify a penalty rate. Credit card agreements frequently contain a reservation of rights clause that permits the lender to change any term at any time, so long as notice is provided. Under section 226.9(c)(1), a creditor that decides to increase the consumer's interest rate due to delinquency pursuant to a reservation of rights clause is changing a term of the agreement and must give notice "before the effective date of the change." 12 C.F.R. § 226.9(c)(1).[3] *Second*, a creditor can impose a new rate

---

[3] A change-in-terms notice would also be required if the agreement specified a maximum penalty rate that was lower than the rate the creditor chose to impose, or if the creditor wanted to expand the list of events that would trigger the penalty rate. For example, if an agreement had a provision permitting a penalty rate of up to 20% and, be-

following default *in accordance with the existing terms* of the agreement. For example, a credit agreement may provide that a creditor may impose a penalty rate of up to 24% upon the consumer's default. Assuming that the default contingency set out in the agreement occurs, the creditor may implement the rate increase in accordance with the agreement. This does not result in a changed term; rather, it simply implements a term that was already agreed to between the creditor and the consumer in the initial contract. In this case *no* change-in-terms notice need be given under section 226.9(c), because there has been no change in terms. OSC comment 9(c)-1. Rather, the increased rate must be disclosed in the periodic statement for the billing cycle during which the increased rate became effective. 12 C.F.R. § 226.7.

This interpretation, which distinguishes between methods of rate changes, has been expressed in a number of *Federal Register* documents published by the Board in the past several years. In 2004, during the initial stage of a periodic review of Regulation Z, the Board specifically sought comment on whether the disclosures provided in connection with rate changes were adequate where creditors had disclosed the circumstances triggering rate increases in the initial disclosures. The Board wrote:

> *Disclosures about rate changes.* Under Regulation Z, some changes to the terms of an open-end plan require additional notice. . . . However, advance notice is not required in all cases. For example, if the interest rate or other finance charge increases due to

---

cause of changed economic circumstances, the creditor wanted to impose a penalty rate of 24%, the creditor would have to provide notice under section 226.9(c) regarding that term change.

> a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. § 226.9(c)(1); comment 9(c)(1) 1. *And no change in terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c) 1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if card issuer [sic] learns the consumer paid late on another credit account, even if the consumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change in terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.*

69 Fed. Reg. 70925, 70931-32 (December 8, 2004) (emphasis added). Noting that "[c]onsumer advocates have expressed concerns that consumers who have triggered certain penalty rates may not be aware of the possibility of the increase, and thus are unable to shop for alternative financing before the increased rate takes effect," *id.* at 70932, the Board asked for input on whether these "existing disclosure rules" are "adequate to enable consumers to make timely decisions about how to manage their accounts." *Id.*

The Board returned to this issue in 2007, when it published proposed amendments to Regulation Z and the OSC. 72 Fed. Reg. 32948 (June 14, 2007). Among the "major proposed changes" the Board published for comment was the proposal to "expand the circumstances

under which consumers receive written notice of changes in terms (e.g., an increase in the interest rate)", including "[r]equiring creditors to provide 45 days' prior notice before the creditor increases a rate due to the consumer's delinquency or default." *Id.* at 32949. In introducing the proposed rules on this subject, the Board wrote:

> *Penalty rates.* Currently, creditors must inform consumers about rates that are increased due to default or delinquency, but not in advance of implementation of the increase. Contractual thresholds for default are sometimes very low, and penalty pricing commonly applies to all existing balances, including low-rate promotional balances. An event triggering the default may occur a year or more after the account is opened. For example a consumer may open an account, and a year or more later may take advantage of a low promotional rate to transfer balances form another account. *That consumer reasonably may not recall reading in the account-opening disclosure that a single transaction exceeding the credit limit could cause the interests rates on existing balances, including on the promotional transfer, to increase. Thus, the proposal would expand the events triggering advance notice to include increases triggered by default or delinquency.* Advance notice of a potentially significant increase in the cost of credit is intended to allow consumers to consider alternatives before the increase is imposed, such as making other financial arrangements or choosing not to engage in additional transactions that will increase the balances on their account.

Id. at 32957 (emphasis added).

In accordance with this explanation, the Board proposed an amendment to Regulation Z that would add new section 226.9(g), "*Increase in rates due to delinquency or default or as a penalty.*" *Id.* at 33058. That provision would have required 45 days' advance written notice when "(i) A rate is increased due to the consumer's delinquency or default; or (ii) *A rate is increased as a penalty for one or more events specified in the agreement*, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* (emphasis added). In explaining the new proposed provision, the Board stated that the notice "would be required even if, as is currently the case, the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures." *Id.* at 33012. The Board continued, "[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditors, in that *creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract.* The Board believes that this delay in implementing contract terms is appropriate in light of the potential benefit to consumers." *Id.* (emphasis supplied).

These statements by the Board clearly indicate the Board's understanding that Regulation Z, as it existed prior to the 2009 amendments, *did* "permit immediate application of penalty pricing upon the occurrence" of "events specified in the contract." In fact, it was the absence of any notice requirement in this circumstance that led the Board to propose the amendment to Regulation Z to provide additional protection to consumers in the form of prior notice of penalty rate changes. The

2007 preamble explanation makes clear that the proposed amendment, which it identified as a "major proposed change," *id.* at 32949, represented a substantive change in requirements, not a clarification of existing regulatory language.

In early 2009, the Board adopted its final rule implementing the changes that had been proposed in 2007. *See* 74 Fed. Reg. 5244 (January 29, 2009). Again, the Board identified as a "Major Change" the provision "[r]equiring creditors to provide 45 days' prior notice before the creditor increases a rate either due to a change in the terms applicable to the consumer's account or due the consumer's delinquency or default or as a penalty." *Id.* With regard to penalty rates, the Board explained, in language similar to that used in 2007, that it was requiring advance notice of implementation of those rates even if they were disclosed in the account opening documents:

> *Penalty rates.* Currently, creditors must inform consumers about rates that are increased due to default or delinquency, but not in advance of implementation of the increase. Contractual thresholds for default are sometimes very low, and currently penalty pricing commonly applies to all existing balances, including low-rate promotional balances.
>
> The final rule generally requires creditors to provide 45 days' advance notice before rate increases due to the consumer's delinquency or default or as a penalty, as proposed. Permitting creditors to apply the penalty rate immediately upon the consumer triggering the rate may lead to undue surprise and insufficient time to consider alternative options regarding use of the card. Even though the final rule contain[s]

> provisions intended to improve disclosure of penalty pricing at account opening, the Board believes that consumers will be more likely to notice and be motivated to act if they *receive a specific notice alerting them of an imminent rate increase, rather than a general disclosure stating the circumstances when a rate might increase.*

Id. at 5253 (emphasis supplied).

The Board effected this change by taking two actions, corresponding to the two separate ways described above that rates may be increased upon a consumer's default—that is, increases that result from a change in the terms of the contract, and increases that result from implementation of a previously disclosed contract term. *See supra* pp. 6a-7a. First, the Board amended section 9(c) to require 45 days' prior notice of changes in particular terms in the contract itself, including the term governing the finance charge. *See* 12 C.F.R. § 226.9(c)(2)(i), 74 Fed. Reg. 5413 (January 29, 2009). Amended section 226.9(c)(2) explicitly provided that "[i]ncreases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in [new section 226.9(g)] *that are not due to a change in the contractual terms of the consumer's account* must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section." *Id.* (emphasis supplied). This underscores the fact that the Board interpreted section 9(c) as relating only to changes in rates that *are* "due to a change in the contractual terms" of the account.

Second, the Board adopted new section 9(g), which required 45 days' advance notice of increases in rates due to delinquency, default, or as a penalty, including

penalties for events "specified in the account agreement." *See* 12 C.F.R. § 226.9(g), 74 Fed. Reg. 5414. This latter provision was a substantive change that would not have been necessary if Regulation Z already required consumers to "receive a specific notice alerting them of an imminent rate increase" that occurred in accordance with an existing contractual term.[4]

Both before and after the amendments adopted in January 2009, then, the Board distinguished between rate changes that resulted from a *change* in the contract terms, and those that resulted from the *implementation* of contract terms that called for application of a different rate. Section 226.9(c) governed—and continues to apply to—changes in terms that result from a change in the underlying contract. But as the OSC made clear, prior to the recent adoption of section 226.9(g), "[n]o notice of a change in terms need be given if the specific change is set forth initially." OSC Comment 9(c)-1. So even if a rate changed as a result of the consumer's default, there was no need to provide any "subsequent disclosure" of that change under section 226.9(c)(1) if the circumstances of the change were set forth in the account opening disclosures. Through the adoption of section 226.9(g), the Board changed this rule to provide for advance notice if a rate is increased as a penalty, *including* circumstances where the events triggering the penalty are "specified in the account agreement". 12 C.F.R. § 226.9(g).

---

[4] As noted above, *supra* n.1, new section 226.9(g) was adopted in final form with an effective date of July 1, 2010 through the Board's action in January 2009; following enactment of the Credit CARD Act of 2009, these provisions were adopted effective August 20, 2009 in accordance with the effective date of that statutory amendment.

The district court below understood correctly that the Board interpreted its prior regulation as permitting a creditor to impose a penalty rate without any specific prior notice so long as the circumstances under which the penalty could be imposed, and the maximum rate permitted, were disclosed in the account-opening disclosures. *Shaner v. Chase Bank, USA, N.A.*, 570 F. Supp. 2d 195, 200 (D. Mass. 2008). The district court was puzzled, however, by reference in another portion of the OSC that it believed might conflict with this rule. That provision is found at Comment 9(c)(1)-3, a comment to section 9(c)(1). The Comment, entitled "Timing," provides that advance notice of 15 days "is not necessary – that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change—in two circumstances: If there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default . . . " In the district court's view, this Comment suggested that any change in finance charge attributable to delinquency or default required notice under section 9(c)(1).

Comment 9(c)(1)-3, however, relates only to the timing of subsequent disclosures in those circumstances where section 226.9(c)(1) of the regulation already requires that subsequent disclosures be made; it does not create a substantive requirement to provide disclosures where the regulation and commentary do not already demand them. This is evident not only from the heading of the comment ("Timing—advance notice not required"), but from its location. Comment 9(c)-1 provides the Board's official interpretation of the entirety of section 9(c), relating to subsequent disclosures of changes in terms, and states, as discussed above, that "[n]o notice of a change in terms need be given if the specific

change is set forth initially. . . . " That comment, in the Board's view, controls this case. Comment 9(c)(1)-3 is an interpretation of section 9(c)(1) of Regulation Z, and sets out the timing rules applicable when pre-effective date notice of a rate increase must be given.[5]

The Board also interprets Regulation Z (prior to the 2009 amendments) to provide that no change-in-terms notice is required where a creditor exercises discretion to impose less than the full disclosed penalty rate or no penalty rate at all when a contingency set forth in the contract occurs. In other words, if an agreement that calls for a standard rate of 12% contains a provision stating that upon the consumer's default the creditor "may impose a penalty rate up to a maximum of 24%," the creditor would be permitted to raise the rate following default anywhere between 12% and 24% without providing any pre-effective date notice under existing section 226.9(c). No such notice would be required for the full increase to 24% for the reasons discussed above: imposition of that rate is not a *change* in terms, but an implementation of the existing term. That being the case, no pre-effective date notice would be required if the creditor increased the rate to an intermediate rate, such as 18% or 20%. The Board is aware that credit card companies frequently choose to impose less than the maxi-

---

[5] *See* Comment I-5, explaining "Comment designations": "The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to section 226.18(b) are further divided by subparagraph, such as comment 18(b)(1)-1 and comment 18(b)(2)-1. In other cases, comments have more general application and are designated, for example, as comment 18-1 or comment 18(b)-1."

mum rate increase permitted under the contract terms,[6] and has never viewed that exercise of discretion in the consumer's favor to require a change-in-terms notice where none would have been required had the full increase been immediately imposed.

In the Board's view, this is a simple application of the contractual provision previously disclosed in the initial card agreement, which allows, but does not require, the creditor to impose the maximum penalty rate.[7] This reading is also consistent with the provision of section 226.9(c)(2) that no change-in-terms notice is required "when the change involves . . . a reduction of any component of the finance or other charge." This provision reflects the Board's view that consumers need not be informed in advance of changes that are to their advantage because those changes obviously do not put them at added risk.[8] For the same reason, changes in interest

---

[6] For example, a credit card company might choose not to impose any increase the first time a payment is late, and might impose less than the maximum allowable increase after a second late payment.

[7] As noted at the outset, the Court's hypothetical to the Board involved the situation where the card member agreement provides "that the issuer 'may increase'" the rate upon default "up to a maximum of a [specified] default rate." Order of August 4, 2009.

[8] The Commentary provides that no change in terms notice need be given if the "specific change is set forth initially," OSC Comment 9(c)-1, and identifies some examples of those provisions. The examples are illustrative only, and the Board did not mean by the reference to "specific change" to limit the circumstances for the absence of a change-in-terms notice to those where a precise percentage rate would necessarily be imposed under specified circumstances. For the reasons discussed in text, the Board interprets this provision to mean that if the change implemented by the creditor is permitted by the specific terms of the agreement—for example, if the rate is imposed is at or below the maxi-

rate that are less than the maximum that could be imposed by the creditor need not be disclosed in advance of the effective date if the creditor would not have been required to disclose imposition of the maximum rate.

C. The Court Should Defer To The Board's Interpretation Of The Relevant Provisions of Regulation Z and the Commentary

These interpretations of the Board's Regulation, set forth in the OSC, in the Federal Register notices accompanying the proposed and final amendments to Regulation Z, and indeed in this brief, are entitled to deference from the Court. Particularly in the area of Truth in Lending, the courts have granted great deference to the Board's interpretation of the statute and of its implementing Regulation Z. The Supreme Court has recognized that "because of their complexity and variety, . . . credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 560. For that reason, "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. *Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive.*" *Id.* at 565 (emphasis added).

This early deference has continued through the years in a series of cases including *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981), in which the Court

---

mum identified in the agreement—the provision is satisfied and the rate change does not require a change-in-terms notice.

considered, among other things, a proposed Commentary provision published by the Board; and most recently in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), where the Court again deferred to the Board's interpretation of TILA in Regulation Z.

The Board's interpretation of Regulation Z discussed here—that a change-in-terms notice is not required under the provisions of Regulation Z in effect prior to 2009 when the change implements a contractual term—is no less worthy of deference simply because it relies on statements contained in Federal Register notices published with proposed rule and Commentary amendments. Those statements are authoritative in and of themselves, as the Supreme Court has recognized. Moreover, they are consistent with the Board's *action* in proposing a revision to Regulation Z—the adoption of new section 226.9(g)—that would have been unnecessary had the regulation already required a change-in-terms notice for rate changes that implement the contract terms.

Finally, even if the positions expressed in this brief are not deemed by the Court to have been clear from the Board's prior interpretations, they are nonetheless worthy of deference. As the Supreme Court stated in *Auer v. Robbins*, 519 U.S. 452 (1997), with respect to a position taken in an *amicus* brief submitted, like this one, at the invitation of the Court, *see id.*, 519 U.S. at 461, the fact that the interpretation

> comes to us in the form of a brief . . . does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack,

> *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

Id. at 462.

The same is true here. The Board has been through a lengthy rule-making process in part in order to address some of the policy concerns raised by the prior rule—the rule that governs this case. The rule has now been changed prospectively, but that does not alter its interpretation prior to amendment. It is the Board's position that at the time of the transactions at issue in this case, Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default.

Oct. 22, 2009 Respectfully submitted,

SCOTT G. ALVAREZ,
General Counsel
RICHARD M. ASHTON,
Deputy General Counsel
KATHERINE H. WHEATLEY
Associate General Counsel
Board of Governors of the
Federal Reserve System
20th Street and Constitution
Avenue, N.W.
Washington, DC 20551

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 0 1 2010
OFFICE OF THE CLERK

No. 09-329

In the

Supreme Court of the United States

CHASE BANK USA, NA,
Petitioner,

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Gregory F. Taylor*
C. Dawn Causey
AMERICAN BANKERS ASSOCIATION
1120 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 663-5028
gtaylor@aba.com
**Counsel of Record*

Table of Contents

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. THE NINTH CIRCUIT'S HOLDING IS INCORRECT AND CONTRARY TO THE FEDERAL RESERVE BOARD'S REGULATIONS.. 6

II. THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE BOARD'S PUBLISHED INTERPRETATIONS OF REGULATION Z UNDERMINES CONGNRESIONAL POLICY THAT THE FINANCIAL INDUSTRY SHOULD BE ENCOURAGED TO RELY ON BOARD GUIDANCE REGARDING REGULATION Z AND TILA. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Akzo Nobel Salt, Inc. v. *Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301 (D.C. Cir. 2000) 18

Am. Fed'n of State, County & Mun. Employees v. *Am. Int'l Group, Inc.*, 462 F.3d 121 (2d Cir. 2006) 18

Anderson Bros. Ford v. *Valencia*, 452 U.S. 205 (1981) 15

Auer v. *Robbins*, 519 U.S. 452 (1997).....5, 17, 18, 20

Belt v. *EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006) 19

Bigelow v. Dep't of Def., 217 F.3d 875 (D.C. Cir. 2000) 19

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 17

Christensen v. *Harris County*, 529 U.S. 576 (2000) 18

Coal Co. v. *Seals*, 147 F.3d 502(6th Cir. 1998) 19

Conn. Gen. Life Ins. Co. v. *Comm'r*, 177 F.3d 136 (3d Cir. 1999) 19

EEOC v. *Commercial Office Prods. Co.*, 486 U.S. 107 (1988) 17

Ehlert v. *United States*, 402 U.S. 99 (1971) 17

Evans v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008) 7

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555(1980) 5, 15, 17

Gardebring v. *Jenkins*, 485 U.S. 415 (1988) 17, 18

INS v. *Stanisic*, 395 U.S. 62 (1969) 17

IntraComm, Inc. v. *Bajaj*, 492 F.3d 285 (4th Cir. 2007) 19

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 17, 18

Lyng v. *Payne*, 476 U.S. 926 (1986); 17

McCoy v. Chase Manhattan Bank USA, 559 F.3d 963 (9th Cir. 2009) 17

Mullins Coal Co. v. *Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 484 U.S. 135 (1987) ... 17

N. Ind. Pub. Serv. Co. v. *Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12 (1975) (per curiam) 17

Pauley v. *Bethenergy Mines, Inc.*, 501 U.S. 680 (1991) 17

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 17

Shaner v. Chase Bank USA, N.A., 570 F. Supp. 2d 195 (D. Mass. 2008), *aff'd*, 587 F.3d 488 (1st Cir. 2009) 4, 7, 13, 14

Swanson v. *Bank of Am., N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir.), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009) 7

Swanson v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009) 4, 7

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 17

Udall v. *Tallman*, 380 U.S. 1 (1965) 17

United States v. *Hoyts Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004) 18

United States v. *Larionoff*, 431 U.S. 864 (1977) 17

Statutes

15 U.S.C. § 1604(a) 7

15 U.S.C. § 1640(f) 2, 8, 15, 16

15 U.S.C. 1601(a) 7

Administrative Procedure Act, 5 U.S.C. § 500, *et seq* 16

Other Authorities

69 Fed. Reg. 70925, 70931–32 (Dec. 8, 2004) 4

72 Fed. Reg. 32948, 33009 (June 14, 2007)..... 4, 12

Brief for the United States as Amicus Curiae (filed May 19, 2010)..... 14

Federal Reserve Board Br., *Shaner, supra* (No. 09-1157) (filed Oct. 22, 2009)..... 14

Truth in Lending, 69 Fed. Reg. 70,931-70,932 (2004) (advance notice of proposed rulemaking)..... 11

Truth in Lending, 72 Fed. Reg. 32,948 11

Rules

12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1..... 3, 9

Regulations

12 C.F.R. § 226.6(a)(2) 3, 8

12 C.F.R. § 226.9(c). 3

12 C.F.R. 226.7 9

12 C.F.R. 226.9 ..... 9, 11

12 C.F.R. 226.9(c)(1)..... 9, 12

Official Staff Commentary, cmt. 9(c)(1)-3 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae American Bankers Association (ABA) is a trade association whose members issue credit cards that are subject to the Truth in Lending Act ("TILA") and Regulation Z. The ABA is the principal national trade association of the banking industry in the United States. Its members are located in each of the 50 States and the District of Columbia. ABA members hold a substantial majority of domestic assets of the banking industry of the United States, and they are leaders in consumer financial services, including credit cards.

The questions presented in this case raise important issues for ABA members with regard to the role of the Board of Governors of the Federal Reserve System ("the Board" or "the Federal Reserve Board") and the ability of the industry to safely rely upon the Board's interpretation of its own regulations, such as Regulation Z. Specifically, the decision below failed to adequately defer to the Board's interpretation of its own regulations. Given the technical and complex nature of TILA, Congress has expressly encouraged the banking industry to rely upon the Board for guidance on regulatory matters when drafting its customer agreements by

---

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than the amicus or its members contributed monetarily to the preparation or submission of the brief. The parties have consented to the filing of the brief. Petitioner Chase has filed a statement with the Court preemptively granting consent to the filing of *amici* briefs. A letter from Respondent consenting to the filing of this brief has been lodged with the Court.

providing them with a "safe harbor" from liability when they act in "conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations..." 15 U.S.C. § 1640(f). The Ninth Circuit's decision to reject the Board's construction of Regulation Z, as expressed in its Official Commentary[2] and in administrative rulemakings, directly affects the continued ability of financial institutions to safely rely on Board guidance in connection with TILA.

The ABA has a strong interest in defending the validity of the Board's interpretation of Regulation Z in this case. The decision below failed to defer to the Board's controlling views of its own regulations. In so doing, the panel upset long-settled expectations in the industry. The default rate provision that the Ninth Circuit held to be in violation of Regulation Z is very common in the industry. And, as a result of the Ninth Circuit's ruling, numerous lawsuits seeking enormous penalties have been filed in courts in the Ninth Circuit against banks that constitute approximately 50 percent of the credit card industry. This spate of litigation is particularly alarming because the claims are based on conduct that the industry reasonably believed was in full compliance with the Board's regulations, as interpreted by the Board itself.

---

[2] 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary).

SUMMARY OF THE ARGUMENT

This case involves the obligations of credit card issuers to make certain disclosures to customers under TILA, 15 U.S.C. §§ 1601 *et seq.*, as implemented by the Federal Reserve Board in Regulation Z, 12 C.F.R. pt. 226.[3] Regulation Z generally provides for disclosure by credit card issuers to their customers at the outset of the credit relationship, including the disclosure of "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Regulation Z also requires a credit card issuer to give written notice ("change-in-terms notice") of any "change[s]" it seeks to make to the basic terms of the credit relationship. 12 C.F.R. § 226.9(c).

In its Official Staff Commentary interpreting Regulation Z, the Board made clear that, prior to 2009, the change-in-terms notice required by section 226.9(c) did *not* apply to rate increases that are specifically provided for in the cardholder's initial agreement. 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1 ("Comment 9(c)-1"). Moreover, the Board subsequently stated in the context of related formal rulemaking proceedings that Regulation Z does not require a change-in-terms notice for a periodic rate

---

[3] The Board recently adopted regulations that require a change-in-terms notice in the circumstances presented in this case. *See* 74 Fed. Reg. 36077, 36095 (July 22, 2009). Those regulations, which took effect on August 20, 2009, have no application to this case or any of the other similar lawsuits pending in the lower courts. For simplicity, all citations in this brief to Regulation Z and to the Board's Commentary are to the versions in effect before August 20, 2009.

increase that results from the implementation of a default provision that is specified in advance in the account agreement. See 69 Fed. Reg. 70925, 70931–32 (Dec. 8, 2004); 72 Fed. Reg. 32948, 33009 (June 14, 2007). Despite this, the Ninth Circuit held that § 226.9(c) requires that written notice be given for an increase in a credit card rate, even if that increase is merely the implementation of a default provision that was set forth in the initial disclosure to the customer.

In so holding, the panel's decision is in conflict with (1) the interpretation of Regulation Z by the Board, which has recently made its position crystal clear via *amicus* filings in this and other proceedings, and (2) other courts that have considered this issue, see *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009); *Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009).

The ABA submits that the decision below is plainly wrong. In concluding that Regulation Z requires notice for implementation of a default rate provision, the Ninth Circuit panel misinterpreted the Official Staff Commentary that speaks directly to the issue of whether additional notice is required. Compounding this error, the Ninth Circuit panel failed to defer to the Board's subsequent official statements regarding a creditor's notice obligations under Regulation Z issued in connection with proposed administrative rulemakings.

This Court's precedent establishes that, unless "plainly erroneous or inconsistent with the

regulation," an agency's "fair and considered" interpretation of its own regulation is controlling. *Auer* v. *Robbins*, 519 U.S. 452, 461–62 (1997) (internal quotation marks omitted). In terms of policy, the Ninth Circuit's failure to defer to interpretive statements by the Board undermines the banking industry's ability to rely on the Board's expertise in a "highly technical" area of law where "creditors need sure guidance." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980) (internal quotation marks omitted). Congress "specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law," and has "promote[d] reliance upon Federal Reserve pronouncements." *Id.* The panel failed to account for the value to the industry of being allowed to rely on official agency statements or interpretations (albeit less formal than a final regulation) for guidance with respect to TILA or other regulatory issues.

The issue for *amici* is not only one of business necessity, but of fundamental fairness. Having reasonably relied upon the Board's guidance, the Ninth Circuit's decision would impose potentially significant retrospective liability on the financial services industry as a result of that reliance. The Court should allow the industry to rely on direct and unambiguous statements by the Board with respect to the proper interpretation of it own regulations, as TILA expressly permits.

For these reasons, and as shown below, this Court should reverse the decision of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING IS INCORRECT AND CONTRARY TO THE FEDERAL RESERVE BOARD'S REGULATIONS.

This case takes up the issue of whether, prior to 2009, the notice requirements mandated by TILA and Regulation Z required a lender to provide a defaulting credit card customer with advance notice prior to increasing the cardholder's interest rate in a situation where the credit card agreement (1) disclosed to the customer that the interest rate could be increased due to a default, and (2) specified a maximum rate of interest that the creditor could charge if the cardholder defaulted.

1. The ABA respectfully submits that the Ninth Circuit's ruling incorrectly interprets the text of Regulation Z and the Board's Official Staff Commentary. Many credit card agreements in use within the banking industry provide that the interest rate that a creditor will use to calculate an account holder's finance charge may be increased upon the occurrence of specified contingencies, such as the account holder's failure to make timely payments. These card holder agreements usually set forth the conditions under which a finance charge may be increased, the maximum amount of any such

increase, and whether and what type of additional notice will be provided.

As noted at the petition phase of this proceeding, the conclusion drawn by the Ninth Circuit that the implementation by a creditor of an unchanged, previously disclosed contract provision required additional advance notice to the customer decision under the Board's Regulation Z, stands in stark conflict with another panel of the Ninth Circuit[4] as well as the other Federal Courts of Appeals that have been called upon to resolve this issue. See *Shaner v. Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009); *Swanson* v. *Bank of Am., N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir.), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009).

2. TILA is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. 1601(a). The Board's Regulation Z, adopted pursuant to 15 U.S.C. § 1604(a), requires credit card issuers to disclose certain information to consumers. The statute confers authority on the Board to issue regulations to carry out the statute. *See* 15 U.S.C. 1604(a).

---

[4] An earlier Ninth Circuit panel found the task of construing the Commentary sufficiently straightforward to the point that it designated its opinion "nonprecedential." See *Evans* v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008). See also *Swanson*, 563 F.3d at 635 (commenting on the unpublished status of *Evans* and noting that "nonprecedential decisions should be used only when the legal issue is clear enough that all reasonable judges will come out the same way").

Recognizing that the disclosure requirements of TILA present a highly technical area open to disagreement and dispute regarding what may be required, Congress provided a safe harbor for creditors, protecting them from civil liability under TILA, if they act in good-faith reliance on a rule, regulation, or interpretation issued by the Board or its staff. 15 U.S.C. § 1640(f).[5]

During the relevant period in this litigation, Regulation Z required credit card issuers to provide an "initial disclosure statement" specifying, inter alia, "each periodic rate that may be used to compute the finance charge." 12 C.F.R. 226.6(a)(2). The

---

[5] Section 1640(f) of TILA states:

> No provision of this section, section 1607 (b) of this title, section 1607 (c) of this title, section 1607 (e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C. § 1640(f).

regulation also required credit card issuers to provide a "periodic statement" notifying the consumer of the rates imposed during the previous billing cycle. 12 C.F.R. 226.7. Finally, the regulation imposed certain "subsequent disclosure requirements," 12 C.F.R. 226.9, including a requirement to provide notice "[w]henever any term required to be disclosed under § 226.6 is changed," 12 C.F.R. 226.9(c)(1).

The Board's Official Staff Commentary to the pre-2009 change-in-terms provision explained that the notice requirement did not apply "if the specific change is set forth initially, such as ... an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary). On the other hand, the commentary explained, "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase." *Ibid.*

Regulation Z generally mandated that any required change-in-terms notice be provided 15 days in advance of the effective date of the change. 12 C.F.R. 226.9(c)(1). If a creditor *changed* the rate terms of the cardmember agreement as a result of a consumer's delinquency or default, however, the regulation permitted creditors to increase the rate with less than 15 days' notice, as long as notice was

provided "before the effective date of the change." The Official Staff Commentary explained:

> *Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change * * * [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

Official Staff Commentary, cmt. 9(c)(1)-3.

3. The guidance provided in the Commentary was clarified and reinforced over the years by public statements by the Board. For example, the Board took up the question in 2004 whether to amend the disclosure requirements governing the implementation of contractual default rate provisions. The Advance Notice of Proposed Rulemaking issued by the Board in 2004 explained that, under the then current guidance offered by the Board, no advance notice of a rate increase would be due to a credit card customer if the increase in the interest rate or finance charge was due to a previously disclosed default rate provision:

> Under Regulation Z, some changes to the terms of an open-end plan require additional notice. * * * However, advance notice is not required in all cases. For example, if the interest rate

> or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. 226.9(c)(1); comment 9(c)(1)-3. And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if [the] card issuer learns the consumer paid late on another credit account, even if the consumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 69 Fed. Reg. 70,931-70,932 (2004) (advance notice of proposed rulemaking).

Likewise, in 2007, the Board published proposed amendments to Regulation Z and to the Official Staff Commentary in the Federal Register. Truth in Lending, 72 Fed. Reg. 32,948 (proposed rule). Describing Regulation Z in its then-current

form,[6] the Board proposed an amendment that would require 45 days' advance written notice when

> (i) A rate is increased due to the consumer's delinquency or de fault; or (ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

Id. at 33,058. The Board explained that

> [t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, *in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract.*

Id. at 33,012 (emphasis added).

4. In reaching its decision, the Ninth Circuit clearly misinterpreted the Board's regulations. The text of Regulation Z provided that written notice is required only when a "term" is "changed." 12 C.F.R. § 226.9(c)(1). The panel found the meaning of the regulation to be "ambiguous"[7] with respect to whether it applied to an increase in a periodic rate

---

[6] *Id.* at 33,009.

[7] *McCoy v. Chase Manhattan Bank USA*, 559 F.3d 963, 965 (9th Cir. 2009)

implementing an *unchanged*, previously-disclosed contractual term. There was no ambiguity in the Regulation, the Commentary, or the Board's discussions in its rulemaking notices. Moreover, any latent "ambiguity" regarding the Board's intentions with respect to a lender's pre-2009 disclosure obligations has been definitively removed with the Board's *amicus* filings in the present litigation and before the First Circuit in *Shaner*.

In *Shaner*, the Court of Appeals asked the Board for its views on its own pre-2009 regulations. In response, the Board submitted an *amicus* brief addressing that question. *Shaner*, 587 F.3d at 491. The Board's position in its *amicus* regarding the proper construction of its regulations and Commentary makes it clear that no pre-effective date change-in-terms notice for an annual rate increase is required when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. Moreover, it is consistent with Regulation Z for a creditor to set forth a *maximum* rate that *may* be charged rather than a *specific* rate that *will* be charged if the triggering events and the maximum rate are disclosed in the initial agreement. The Board explained that it

> has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the

> specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Federal Reserve Board Br. at 1, *Shaner*, *supra* (No. 09-1157) (filed Oct. 22, 2009). As the Court is well aware, this same interpretation of a creditor's obligations under TILA and Regulation Z has been reiterated by the Board in its *amicus* to the Court in the present proceeding, in conjunction with the briefing on the cert. petition. *Brief for the United States as Amicus Curiae*, at 11 – 17 (filed May 19, 2010).

5. In sum, the ABA respectfully submits that the panel erred when it failed to correctly interpret the Board's Regulation and Official Commentary or to accord the proper controlling deference to the Board's subsequent interpretation of their meaning. The descriptions of then-current law published by the Board in 2004 and 2007 in connection with the subsequent rulemakings were authoritative

summaries of the Board's interpretation of the existing change-in-terms requirements. These summaries were drafted to help explain the Board's proposals to change the very rules that are at issue here. As such, they clearly warranted the court's deference. See, *e.g.*, *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (deference accorded to official staff interpretation of Regulation Z published in the *Federal Register*). More importantly, they establish that Chase's disclosure practices were fully consistent with the Board-issued guidance or interpretation of its TILA regulations, entitling Chase to the protection of the statute's "safe harbor" provision, 15 U.S.C. § 1640(f).

II. THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE BOARD'S PUBLISHED INTERPRETATIONS OF REGULATION Z UNDERMINES CONGNRESIONAL POLICY THAT THE FINANCIAL INDUSTRY SHOULD BE ENCOURAGED TO RELY ON BOARD GUIDANCE REGARDING REGULATION Z AND TILA.

The Ninth Circuit's decision, if allowed to stand, has significant ramifications for the banking industry with respect to its ability to safely rely on guidance or interpretations issued by the Board. The Court has previously recognized that TILA is "highly technical" in nature and that creditors need "sure guidance" as to the meaning and scope of its provisions. *Milhollin*, 444 U.S. at 566. By failing to defer to the Board's interpretation of its own regulations, the holding below frustrates the

purposes of TILA and fails to take into account the benefit to the banking industry and the public-at-large of being able to safely rely on interpretive guidance from the Board.

1. "Guidance" from the Board regarding compliance with Regulation Z or TILA can take many forms. There are, of course, formal Board regulations as well as the Official Commentary, adopted via notice and comment rulemaking pursuant to the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.* In practice, the industry commonly relies on agency guidance that is issued via other official outlets. For example, it is well-understood within the banking industry and among the banking regulators themselves that the rulemaking process is only one way by which the Board provides the industry with the agency's current interpretation or guidance on a particular issue in a relatively timely fashion. The panel decision, however, takes issue with this well-accepted practice, noting that:

> Although Chase may, at a later stage of litigation, assert a statutory "good-faith" defense under 15 U.S.C. § 1640(f) for acting in conformity with an FRB interpretation promulgated "under such procedures as the Board may prescribe," the defense is only available for actions based on the Official Staff Commentary, not on such incidental interpretations appearing in an ANPR...

McCoy, 559 F.3d at 969, n. 5.

2. In a long line of cases beginning with *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Court has held that where an agency interprets its own regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* See also *Udall* v. *Tallman*, 380 U.S. 1, 16–17 (1965); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971); *N. Ind. Pub. Serv. Co.* v. *Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam); *United States* v. *Larionoff*, 431 U.S. 864, 872–73 (1977); *Milhollin*, 444 U.S. at 566; *Mullins Coal Co.* v. *Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 484 U.S. 135, 159 (1987); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991); *Martin*, 499 U.S. at 150–51; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Auer*, 519 U.S. at 461; *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007).

While the Court has previously made clear that *Chevron* deference is not owed to an agency interpretation of a *statute* it administers if that interpretation is contained in an informal issuance

such as an opinion letter, policy statement, agency manual, or enforcement guideline, "all of which lack of the force of law." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), this Court has held that deference to an agency's interpretation of its own *regulations is* warranted so long as the interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.[8] Accordingly, this Court has been willing to defer to agency interpretations of regulations where they appear in a legal brief, *id.*; *Gardebring*, 485 U.S. at 430, or in an "Advisory Memorandum" issued only to internal agency personnel and which the agency appeared to have written in response to the pending litigation, *Long Island Care at Home, Ltd.*, 551 U.S. at 171 (internal quotation marks omitted).[9]

---

[8] *Accord Am. Fed'n of State, County & Mun. Employees* v. *Am. Int'l Group, Inc.*, 462 F.3d 121, 126 (2d Cir. 2006) (explaining that "while agency interpretations that lack the force of law do not warrant deference when they interpret ambiguous *statutes*, they do normally warrant deference when they interpret ambiguous *regulations*") (emphasis in original); *Akzo Nobel Salt, Inc.* v. *Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000) ("[A]gency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) do not warrant *Chevron*-style deference when they interpret ambiguous *statutes* but do receive deference under *Auer* when interpreting ambiguous *regulations*.") (emphasis in original) (internal quotation marks omitted).

[9] See *United States* v. *Hoyts Cinemas Corp.*, 380 F.3d 558, 567 (1st Cir. 2004) (deferring to an agency's interpretation even though the agency's "gloss" came "only in a brief rather than in some more formal manner (*e.g.*, an interpretive ruling)"); *Am. Fed'n of State, County & Mun. Employees* v. *Am. Int'l Group, Inc.*, 462 F.3d 121, 126 (2d Cir. 2006) (deferring to

3. The ABA submits that the panel's holding on deference is simply incorrect. The Ninth Circuit's decision, if allowed to stand, calls into question the continued ability of financial institutions to reasonably – and safely - rely on anything other than formal statements or guidance issued by the Board via notice and comment rulemaking pursuant to the Administrative Procedure Act. As discussed above, the law does not require such rigor. Courts regularly defer to agency interpretations of their own regulations that are embodied in considerably less formal statements than those at issue in the present litigation. The Board's plain and repeated statements—whether they are offered in an *amicus* brief submitted by the agency or contained in regulatory documents such as the preamble to a proposed rule that is published in the Federal Register—plainly "reflect the

---

an agency interpretation provided in a proposed amendment to the regulation and stating that "[w]hen the language of a regulation is ambiguous, we typically look for guidance in *any* interpretation made by the agency that promulgated the regulation in question") (emphasis added); *Conn. Gen. Life Ins. Co.* v. *Comm'r*, 177 F.3d 136, 144 (3d Cir. 1999) (deferring to an agency interpretation offered as a "'mere' litigating position"); *IntraComm, Inc.* v. *Bajaj*, 492 F.3d 285, 293 (4th Cir. 2007) (deferring to an agency interpret-tation offered in an amicus brief); *Belt* v. *EmCare, Inc.*, 444 F.3d 403, 415 (5th Cir. 2006) (deferring to informal agency interpretive statements in an opinion letter, handbook, and amicus brief); *Glen Coal Co.* v. *Seals*, 147 F.3d 502, 521 (6th Cir. 1998) (deferring to an agency interpretation offered as a "litigating position"); *Bigelow* v. *Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir. 2000) (deferring to an interpretation of regulations set forth by government counsel in its brief).

agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462.

CONCLUSION

For the foregoing reasons, the Court should overturn the Ninth Circuit's decision.

C. Dawn Causey
Gregory F. Taylor*
American Bankers Association
1120 Connecticut Ave. NW
Washington, DC 20036
(202) 663-5028
gtaylor@aba.com
* *Counsel of Record*